1295 No. 3703 1296

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN T. LITTLEJOHN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

FILED
JUL - 6 1921
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Names and Addresses of Attorneys of Record.

Messrs. FAVOUR & CORNICK, Prescott, Arizona,
Attorneys for Plaintiff in Error.

Messrs. O'SULLIVAN & MORGAN, Prescott, Arizona,
Attorneys for Defendant in Error. [1*]

In the Superior Court of Yavapai County, State of Arizona.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant corporation and for cause of action states and alleges:

I.

That plaintiff is a resident of Yavapai County, State of Arizona; that defendant, United Verde Extension Mining Company is a corporation duly organized and existing according to law, and was during all the times herein mentioned and still is doing and carrying on a smelting and ore reduction business in the Verde Mining District, Yavapai County, State of Arizona.

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*Page-number appearing at foot of page of original certified Transcript of Record.

II.

That heretofore, to wit, on the 2d day of June, 1920, and for a long time prior thereto, in the Verde Mining District, county of Yavapai, State of Arizona, the defendant corporation was the owner of, and was then and there operating and conducting a certain smelter and ore reduction works, together with all appurtenances thereto belonging or in anywise appertaining, in the sampling, treating, reducing and smelting of ores and minerals. That defendant's said smelter and ore reduction plant, together with its appurtenances, did then and [2] there consist of smelters, mills, shops, works, yards, plants and factories where steam, electricity and other mechanical power was then and there used to operate the machinery and appliances, in and about said smelter and ore reduction works and appurtenances aforesaid.

III.

That on, to wit, said 2d day of June, 1920, and for some time previous thereto, plaintiff was and had been employed by defendant corporation as a laborer in what was designated and known as the "Bull Gang"; that plaintiff, as directed by defendant corporation and as such employee in said "Bull Gang," did work in and around said smelter and ore reduction works and in and around the mills, shops, works, yards, plants, factories and other buildings and appurtenances thereto belonging; that plaintiff's work as an employee of defendant corporation as aforesaid did consist of pick

and shovel work, clearing up the yards, loading and unloading brick and lime, laying track for ore and slag cars, drilling holes in slag dumps, assisting in repairing said smelter and ore reduction works, together with the said appurtenances, and in installing machinery, fixtures and equipments in said smelter and ore reduction works and appurtenances thereto.

IV.

That on said 2d day of June, 1920, while employed by defendant corporation as aforesaid, plaintiff did then and there receive and suffer severe and permanent personal injuries, hereinafter fully set forth, and which said personal injuries were then and there caused by an accident arising out of and in the due course of said labor, service and employment, and was due to a condition or conditions of said occupation and employment, and which said injuries were not caused by the (2) [3] negligence of said plaintiff; and which said personal injuries did occur in manner following, to wit:

That on the said 2d day of June, 1920, at about the hour of ten o'clock in the forenoon of said day, while plaintiff was then and there in the employ of the defendant corporation as aforesaid, he, the said plaintiff, was directed and ordered by said defendant corporation and its foreman in charge of said "Bull Gang," to assist in installing certain equipments, in defendant's sample-mill then and there being a mill used by defendant to sample, treat and crush ores, and said sample-mill

then and there being a part of said smelter and ore reduction works, and an appurtenance thereto; that plaintiff did thereupon engage in said work as directed; that while plaintiff was assisting in putting in said equipment in said sample-mill, he was then and there ordered and directed by defendant corporation and its said foreman of said "Bull Gang" to place and install in the framework of certain rolls or rollers in said sample-mill a large iron bolt or rod approximately four feet in length by about two inches in diameter, and weighing approximately one hundred pounds; that plaintiff, while then and there in the due course of his said occupation and employment, was then and there ordered and directed by defendant and its said foreman of said "Bull Gang" to take said iron bolt or rod and go upon a certain board platform then and there covering a certain concrete pit about ten feet deep by about the same dimensions in width and length; and then and there situate below said platform and in said sample-mill aforesaid; that plaintiff, as directed, did take said iron bolt or rod in his arms and did proceed to and upon said board platform for the purpose of placing and installing the same as aforesaid; that when plaintiff arrived on said board platform covering said concrete pit, he, the said plaintiff, did then (3) [4] and there with his hands and arms elevate said iron bolt or rod preparatory to placing the same in the frame work of said rolls or rollers as directed and ordered so to do, but that while plaintiff had said iron bolt or rod in his arms partially

raised and ready to place the same as aforesaid, the plank upon which he was then and there standing suddenly and without warning did break, thereby violently precipitating plaintiff and said iron bolt or rod through said broken plank and platform to the bottom of said concrete pit, a distance of approximately ten feet; that in falling through said broken plank and platform to the bottom of said concrete pit, plaintiff did then and there and thereby suffer great, serious and permanent bodily injuries as follows: That his head, arms, legs and body struck the bottom of said concrete pit, with great force and violence, and he was struck by said iron rod or bolt in its descent to the bottom of said concrete pit; that thereby he was rendered unconscious; that his skull, frontal bone, temples and left side of his heal were bruised, injured and damaged; that his shoulders, legs, arms, neck and other portions of his body were also bruised and injured; that by reason of said fall, he did receive a severe concussion of the brain, spinal column and shock to his nervous system; that said injuries are permanent. That by reason of said injuries plaintiff did suffer and endure great physical and mental pain and anguish and will permanently suffer the same; that by reason of said personal injuries aforesaid, and the consequent physical and mental pain, suffering and anguish, plaintiff has sustained general damages in the sum of Ten Thousand Dollars ($10,000.00).

V.

That plaintiff is fifty-seven years of age and (4)

[5] prior to receiving said personal injuries was an able-bodied man and in good health; that he was earning the sum of $4.60 per day, and would have earned at least that sum per day during the rest of his natural life, had he not received said injuries; that by reason of said personal injuries plaintiff has been unable to work, save and except for a period of about seventeen days (when he was put to work by defendant corporation, and then discharged by it). That he has sustained special damages for loss of time by reason of said injuries in the sum of $4.60 per day from June 2, 1920, until the trial of this cause, less said period of seventeen days aforesaid.

VI.

That this action is brought under and by virtue of the laws of the State of Arizona, in such case made and provided, viz., by virtue of the provisions of Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, said Chapter VI aforesaid being entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations." That plaintiff's employment, as aforesaid, at the time of said injury, was a dangerous and hazardous occupation, because of risks and hazards which are inherent in such occupations, as defined by the terms and provisions of said Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, aforesaid.

VII.

That by reason of said personal injuries described aforesaid, said plaintiff has suffered general damages in the sum of Ten Thousand Dollars

($10,000.00); that by reason of loss of time and loss of wages as alleged aforesaid, plaintiff has suffered special damages in the sum of $4.60 per day from (5) [6] *from* June 2, 1920, until the trial of this cause, less a period of seventeen days.

WHEREFORE, plaintiff, John T. Littlejohn, prays judgment against the defendant, United Verde Extension Mining Company, a corporation, as follows:

1. For the sum of Ten Thousand Dollars ($10,000.00) general damages for personal injuries sustained, including physical and mental pain, suffering, anguish ~~and distress~~.

2. For the sum of $4.60 per day from June 2, 1920, until the trial of this cause (less a period of seventeen days), for special damages for loss of time (and loss of wages) occasioned by reason of said personal injuries sustained.

3. For costs of suits.

O'SULLIVAN & MORGAN,
Attorneys for Plaintiff.

[Endorsed]: Filed 1:30 o'clock P. M. Aug. 10, 1920. J. C. Woods, Clerk. By P. V. Clibborn, Deputy. (6) [7]

[Endorsements]: L–85 (Prescott). #7922. Complaint, Notice of Petition for Removal, Bond for Removal and Order for Removal, in Cause No. 7922. John T. Littlejohn, Plaintiff, vs. United Verde Extension Ming. Co., a Corporation, Defendant. Filed Sept. 20, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

(CLERK'S NOTE: The foregoing complaint, together with the other papers mentioned in the foregoing endorsement, were filed in the District Court of the United States for the District of Arizona, September 20, 1920, on removal from the Superior Court of Yavapai County, State of Arizona.

C. R. McFALL,
Clerk.) [8]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Motion to Strike.

Comes now the above-named defendant and respectively moves the Court that the following portions of plaintiff's complaint be struck out as irrelevant, immaterial, speculative and as contrary to the provisions of the statute and statutory liability upon which plaintiff's cause of action is stated to be brought:

I.

In paragraph V of plaintiff's complaint, on page 5 thereof, at line 7, the following clause:

"when he was put to work by defendant corporation and then discharged by it."

II.

In paragraph V of plaintiff's complaint, on page 5 thereof, the last sentence of said paragraph: "That he has sustained special damages for loss of time by reason of said injuries in the sum of Four and 60/100 ($4.60) Dollars per day from June 2, 1920, until the trial of this cause, less said period of seventeen (17) days aforesaid."

III.

In paragraph VII of plaintiff's complaint, on page 5 thereof, at the third line of said paragraph: "that [9] by reason of loss of time and loss of wages as alleged aforesaid plaintiff has suffered special damages in the sum of Four and 60/100 ($4.60) Dollars per day from June 2, 1920, until the trial of this cause less a period of seventeen (17) days."

IV.

All of paragraph II of plaintiff's prayer for judgment on page 6 of plaintiff's complaint.

FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsements]: Copy received this 16th day of October, 1920.

O'SULLIVAN & MORGAN,
Attys. for Plnf.

Filed Oct. 18, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [10]

In the District Court of the United States, in and for the District of Arizona.

L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Answer.

Now comes the above-named defendant and answers to plaintiff's complaint as follows:

DEMURRERS.

I.

Defendant demurs to the whole of said complaint on the ground that it appears on the face thereof that the facts stated therein are not sufficient to constitute a cause of action against this defendant.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

FAVOUR & CORNICK,
Attorneys for Defendant.

II.

Without waiving its foregoing demurrers, defendant demurs to said complaint on the ground that the facts stated do not show any cause of action for special damages as prayed for.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

FAVOUR & CORNICK,
Attorneys for Defendant. [11]

III.

Without waiving its foregoing demurrers defendant demurs to said complaint on the ground that the facts stated do not support or allege a cause of action for special damages under the Employers' Liability Law upon which plaintiff's complaint is based.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs herein.

FAVOUR & CORNICK,
Attorneys for Defendant.

PLEA IN BAR.

I.

Further answering said complaint but without waiving any of its foregoing demurrers the defendant denies each and every, all and singular, the allegations in said complaint contained.

II.

Further answering said complaint but without waiving any of the defenses hereinbefore interposed, defendant alleges that if the plaintiff was injured, either as alleged in his complaint or otherwise, which injuries are not admitted but are expressly denied by defendant, the said injuries resulted from and were wholly caused by the negligence of said plaintiff in failing to take that care

and caution which a man of ordinary prudence would take under similar conditions.

WHEREFORE, defendant prays judgment and for dismissal of this action and for its costs.

FAVOUR & CORNICK,
Attorneys for Defendant. (2)

[Endorsements]: Answer. Copy received this 16th day of October, 1920.

O'SULLIVAN & MORGAN,
Attorneys for Pltf.

Filed Oct. 18, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [12]

At a regular term, to wit, the November, 1920, Term of the United States District Court for the District of Arizona, held in the courtroom of said court in the city of Tucson, State and District of Arizona, on Monday, the 8th day of November, A. D. 1920—Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—November 8, 1920.)

L–85—PRESCOTT.

JOHN T. LITTLEJOHN,
Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,
Defendant.

(Minutes of Court—November 8, 1920—Order on Defendant's Demurrer—Order on Defendant's Motion to Strike.)

IT IS ORDERED that defendant's demurrer be and the same is hereby overruled.

IT IS ORDERED that the first ground of defendant's motion to strike, be and the same hereby is sustained; that the second ground thereof be and the same is hereby overruled; that the third ground thereof be and the same hereby is sustained in part by striking out the words "and loss of wages"; and that the fourth ground thereof be and the same hereby is sustained in part by striking out from the prayer of the complaint the words "and loss of wages." [13]

At a regular term, to wit, the September, 1920, Term of the United States District Court for the District of Arizona, held in the courtroom of the said court, in the city of Prescott, State and District of Arizona, on Friday, the 26th day of November, A. D. 1920, at the hour of 9:30 o'clock A. M.—Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—November 26, 1920.)

L–85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—November 26, 1920—Order Allowing Defendant an Exception to Court's Ruling on Demurrer and Motion to Strike.

On motion duly made, IT IS ORDERED that defendant may have an exception to the ruling of the Court of November 8, 1920, on defendant's demurrer and motion to strike. [14]

At a regular term, to wit, the September, 1920, Term of the United States District Court for the District of Arizona, held in the courtroom of the said court, in the city of Prescott, State and District of Arizona, on Friday, the 26th day of November, A. D. 1920—Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—November 26, 1920.)

L–85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—November 26, 1920—Trial.

This case coming on regularly for trial this day, come now Messrs. O'Sullivan & Morgan, for and on behalf of the plaintiff, and also the plaintiff in person; and come also Messrs. Favour, Cornick and Baker, attorneys for defendant. Both sides announce ready for trial. Thereupon eighteen jurors are called into the jury-box by the clerk and duly sworn to answer as to their qualifications, and are then examined by respective counsel; thereupon respective counsel exercise their peremptory challenges, and the following twelve jurors are selected to try this case and duly sworn for that purpose, viz.: L. F. Nailson, W. E. Spaulding, Fletcher B. Howard, Wm. Lawler, A. W. Davis, Wm. Johnson, W. R. Uber, Lewis A. Cross, W. H. Mackay, Wm. Beeson, J. C. Lusk, and Tom Richards.

P. W. O'Sullivan, Esquire, reads the complaint filed herein aloud to the jury. Ben Rudderow is sworn as court reporter for defendant. John T. Littlejohn, the plaintiff, is sworn and examined, and cross-examined. The defendant moves the

Court to declare a mistrial, motion overruled to which ruling of Court defendant duly excepts. The plaintiff to further maintain the issues on his part calls the following witnesses each of whom is in turn duly sworn, [15] examined and cross-examined, viz.: J. B. McNally, Frank Clark, Robert E. Lee, Harry Garrison and Mrs. Sarah Littlejohn. And thereupon the plaintiff rests his case.

Thereupon the defendant for the purpose of maintaining on his part the issues herein calls the following witnesses, each of whom is in turn duly sworn, examined and cross-examined, viz.: G. S. Purtyman, Dr. James R. Moore, Dr. R. H. Thigpen, and Dr. H. T. Southworth, and thereupon the defendant rests its case. Whereupon the plaintiff to further maintain the issues on his part calls Sarah Littlejohn in rebuttal. The jury is then excused until 9:00 A. M. November 27th, A. D. 1920.

November 27, 1920. 9:00 A. M. same persons present at same place, and trial is continued with defendant moving for a directed verdict in favor of defendant. Motion overruled. Joseph H. Morgan makes opening argument for plaintiff: A. H. Favour and Arthur G. Baker argue on behalf of the defendant, and P. W. O'Sullivan makes final argument on behalf of plaintiff.

The defendant files requested instructions. The Court then instructs the jury orally, whereupon said jury retires in charge of bailiff, W. W. Lewis, who is first duly sworn for that purpose, to consider their verdict. After a time the jury return into open court in charge of their bailiff, and upon

being asked by the Court if they have agreed upon a verdict, through their foreman they state that they have agreed. Whereupon the said jury through their foreman present their verdict as follows:

L–85.

JOHN T. LITTLEJOHN,

Plaintiff,

against

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at Eight Thousand Dollars 8000/00 Dollars.

A. W. DAVIS,
Foreman.

And, the clerk, inquiring of said jury if such is their verdict, [16] they state that is, and so say they all; whereupon the Court orders the verdict recorded, and the jury discharged from the case. [17]

In the District Court of the United States in and for the District of Arizona.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING CO.,

Defendant.

Motion for Directed Verdict.

Comes now the defendant at the close of the evidence and before argument of counsel and moves the Court to direct the jury to return a verdict in favor of the defendant, and as grounds assigns:

1. There is no evidence to sustain a verdict for the plaintiff.

2. The weight of the evidence preponderates in favor of the defendant and against the contention of the plaintiff.

3. This suit is brought under the Employer's Liability Law of Arizona, Chapter VI, Title 14, R. S. A. 1913, and there is no evidence of either the plaintiff or the defendant that the plaintiff was engaged at the time of the happening of the alleged accident and injury upon which the suit is founded in any of the occupations declared and determined to be hazardous within the meaning of said law.

4. There is no evidence in the record proving or tending to prove as required by Sec. 3158, R. S. A. 1913, that the accident and injury alleged arose out of and in the course of the employment of the plaintiff and was due to a condition or conditions

of such employment, or that the accident and injury alleged were not caused by the negligence of the plaintiff.

5. The evidence shows that the accident could have been avoided by the exercise of care which a reasonable and ordinarily prudent person would have exercised under the same conditions, and the said accident alleged was due to the negligence of the plaintiff.

6. Plaintiff has not introduced evidence to support, and [18] there is no evidence to support the allegations of the complaint that plaintiff was working in defendant's sample mill, or in any other building or structure where his occupation was hazardous as defined by the law aforesaid.

7. There is no evidence that the alleged accident was caused by any condition inherent in a hazardous occupation, but the evidence shows that the accident was due to ordinary and avoidable causes in no way conditions of hazardous occupation or any kind.

FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsed]: Filed Nov. 27, 1920. C. R. McFall, Clerk. [19]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Judgment on Verdict.

This cause came on regularly for trial on the twenty-sixth day of November, 1920; the said parties were present in person and represented by their attorneys. Messrs. O'Sullivan & Morgan, counsel for plaintiff, and Messrs. Favour & Cornick and A. G. Baker, counsel for the defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were duly sworn and examined and the cause was thereafter continued and tried on the twenty-sixth and twenty-seventh days of November, 1920. After hearing the evidence, the instructions of the Court and the arguments of the counsel, the jury retired to consider their verdict and subsequently on the twenty-seventh day of November, 1920, returned into court with their verdict signed by the foreman, in accordance with the law, and being called, answer to their names and say:

"In the District Court of the United States, in and for the District of Arizona.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the [20] above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at eight thousand dollars $8000.00 Dollars.

A. W. DAVIS,
Foreman."

NOW, THEREFORE, it is ORDERED, that judgment be entered herein in favor of plaintiff, John T. Littlejohn, and against the defendant, United Verde Extension Mining Company, a corporation, in accordance with the verdict in said cause, in the sum of Eight Thousand Dollars ($8,000.00).

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is

ORDERED, ADJUDGED AND DECREED that plaintiff, John T. Littlejohn, do have and recover of and from the defendant, United Verde Extension Mining Company, a corporation, the sum of Eight Thousand Dollars ($8,000.00), with interest thereon at the rate of six per cent per annum from

date hereof until paid, and for plaintiff's costs incurred and expended in said action, taxed at the sum of One Hundred Nine & 40/100 Dollars; and that execution issue.

Dated and entered in open court this 27th day of November, 1920. (2) [21]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Motion in Arrest of Judgment and to Set Aside Verdict.

Comes now the defendant and moves the Court to set aside the verdict in the above cause and to arrest the judgment therein based upon, or to be based upon said verdict, and as grounds assigns the following:

I.

On the face of the pleadings and the verdict it is manifest that the jury by their verdict did not pass fully and adequately on all material issues, in that, the plaintiff raised in his complaint two separate and distinct material issues, to wit, a pleading and

prayer for general damages and independently a pleading and prayer for special damages, whereas the verdict simply assessed damages without stating or showing whether they were assessed as, and in response to, the issue for general damages or to the issue for special damages.

II.

The verdict is irresponsive for the reasons stated above, and especially because the verdict does not show whether the damages assessed are assessed as general or special damages, [22] or as a lump sum including both; and if said damages so assessed were intended as general, then the verdict is clearly irresponsive to the issue of special damages as no special damages are then assessed; if said damages were intended as special damages, the verdict is irresponsive to the issue of general damages, and the special damages are manifestly excessive over and above approximately $722.00; and if said damages were intended as a lump sum covering both general and special damages, there is no possible way of determining what proportion is intended as general and what proportion is intended as special damages, and the defendant is thereby deprived by said irresponsive verdict of his legal right to know and be informed, if excessive special damages were assessed contrary to law and in derogation of the defendant's lawful property rights.

III.

The verdict is uncertain for the reasons hereinabove set forth and especially because it cannot be determined therefrom whether or not the jury

passed upon the issue of general damages and not upon the issue of special damages, or passed upon the issue of special damages and not upon that of general damages; or passed upon both issues but failed to assess damages for but one of said issues, or passed upon both issues and included damages for both issues in a lump sum, failing to set forth the proportion assessed for each issue and thereby failing to return a complete, proper and legal verdict and a verdict upon both material issues of the cause.

IV.

The verdict is contrary to the law, for the reasons hereinbefore set forth and because the form of said verdict, its uncertainty, its failure to respond to and decide the two material (2) [23] issues, deprives the defendant of its legal right to be informed upon which of the two issues the verdict is returned against it, and if the verdict is against the defendant on both issues, then to be informed of the amount of damages assessed against defendant on each separate issue as set forth and specially pleaded in the complaint and upon which evidence was introduced.

V.

The verdict is against the law for the reasons hereinbefore set forth and because the verdict leaves open and undecided the question whether or not any damages have been assessed or omitted to be assessed on one of the two material issues against defendant and which issue it is that may not have been decided and disposed of by the jury and its

verdict; and because a verdict must be responsive, certain and legal and must decide all material parts of plaintiff's demand.

VI.

The verdict is void for the reasons herein set forth and a judgment based thereon is *ipso facto* void.

VII.

The verdict and any judgment based thereon is void, contrary to law and is not due process of law and seeks to deprive the defendant of its property without due process of law as said due process is guaranteed by the Fifth Amendment to the Constitution of the United States, and unless said verdict is set aside and the judgment thereon is arrested as prayed for herein the said defendant will be deprived of its property without due process of law and of its rights under the common law, all in violation of the said Fifth Amendment to the Constitution of the United States, and of the Seventh Amendment thereto. (3) [24]

WHEREFORE, defendant prays that this Honorable Court grant defendant's motion for such further and other relief as the Court may deem to be required by law.

FAVOUR & CORNICK,
Attorneys for Defendant. (4)

[Endorsements]: Service accepted this 1st day of December, 1920.

O'SULLIVAN & MORGAN,
Attys. for Plaintiff.

Filed Dec. 3, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [25]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN J. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Motion for New Trial.

Comes now the defendant and without waiving its motion in arrest of judgment and to set aside verdict, respectfully moves the Court for a new trial for the following causes materially affecting substantial rights of the defendant. This application is based upon the pleadings and all papers filed in the case and the minutes of the Court and transcript of the testimony and instructions and upon all the grounds set forth in the said motion in arrest of judgment and to set aside the verdict filed herein, which is made a part hereof the same as if fully incorporated and set out herein.

I.

Irregularities in proceedings of the Court, jury and adverse party, and discretion by which the defendant was prevented from having a fair trial:

(1) Because the verdict was uncertain, irresponsive to the issues of both general and special damages and prejudicial to defendant's legal right to be informed what issues, if any, were found against him and whether the amount which should have been assessed on each issue so found was excessive. [26]

(2) Because the counsel for the plaintiff was permitted, over objection, to argue to the jury upon the decreased earning power of the dollar.

(3) Because the counsel for the plaintiff was permitted to argue to the jury upon the mortality tables, which had been admitted in evidence over the objection of defendant, and to argue that plaintiff would have earned a sum named in excess of $25,000.00 during his expectancy of life, whereas plaintiff was asking for only $10,000.00 and special damages.

(4) Because the counsel for the plaintiff was further permitted to argue to the jury in connection with said mortality tables that the wife of the plaintiff was entitled to a substantial sum in case plaintiff should die within a year or a short time.

II.

Excessive damages which appear to have been given under the influence of passion or prejudice or both in that:

(1) There was no evidence that the plaintiff had suffered permanent injury or incapacity.

(2) The amount named in the verdict, if considered as general damages, or as general and special damages combined, which is not admitted by defendant but specifically denied, is in excess of the cost

of a reasonable annuity based upon allowance of full pay for the full expectancy of life of a man of fifty-seven years permanently and totally incapacitated.

(3) The trial occurred too soon after the accident, if the alleged injury was claimed to be permanent and not temporary to warrant a determination of whether or not the recovery from the injuries alleged would be complete or partial. (2) [27]

III.

Insufficiency of the evidence to justify the verdict, in that no evidence was offered or introduced to prove that the plaintiff was not negligent, and no evidence was offered or introduced that the accident was due to an inherent hazard of a hazardous occupation or to a condition of the employment.

IV.

The verdict is against the law for all the reasons set forth herein.

V.

Errors of law to the prejudice of the defendant at the trial, to wit:

(1) The Court erred in overruling the defendant's motion to strike from the complaint the allegations and prayer for special damages on account of alleged loss of time, and in overruling defendant's special demurrer to the complaint based upon the allegations of special damages.

(2) The Court erred in overruling the defendant's general demurrer to the complaint, for the reason that upon the face thereof it appeared that the accident was not one inherent to a condition of a hazardous occupation.

(3) The Court erred in permitting the plaintiff, over the objection of the defendant, to testify that after working seventeen days subsequent to the time of the accident he was discharged because he stated he was told that he could not do the work laid out for him.

(4) The Court erred in denying the motion of the defendant to declare a mistrial because of testimony of the plaintiff in reference to what was told him by one E. H. Thompson concerning insurance assumed to have been carried by the defendant to cover accidents to employees. (3) [28]

(5) The Court erred in admitting in evidence, over objection and exception of defendant, the American Mortality Tables, for the reason that no evidence was introduced to show the applicability thereof to the plaintiff.

(6) The Court erred in denying the motion of the defendant that the jury be directed to return a verdict for the defendant, at the close of the evidence, upon the ground and for the reasons set forth in said motion, which is hereby incorporated and made a part hereof the same as if fully set out, and for the reason that the evidence showed that the alleged accident was an avoidable occurrence and not an accident due to an inherent risk of a hazardous occupation and due to a condition of the employment therein.

(7) The Court erred in instructing the jury that mortality tables might be considered and in making reference to and permitting reference to be made to the said tables.

VI.

The Court erred in refusing to give defendant's instructions numbers 3, 6, 7 and 10.

VII.

The Court erred in giving, over objection, plaintiff's instructions 1, 2, 3 and 4.

WHEREFORE, defendant prays that the verdict and judgment be set aside and that a new trial be ordered, and for such other order as to the Court may seem proper.

FAVOUR & CORNICK,
Attorneys for Defendant. (4)

Dated Prescott, Arizona, December 18, 1920.

[Endorsements]: Service accepted this 20th day of Dec., 1920.

O'SULLIVAN & MORGAN,
Attys. for Plaintiff.

Filed Dec. 21, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [29]

At a regular term, to wit, the November Term, 1920, of the United States District Court for the District of Arizona, held in the courtroom of the said court, in the City of Tucson, State and District of Arizona, on Monday, April 4, 1921—Honorable WILLIAM H. SAWTELLE, District Judge Presiding.

(Minute Entry—April 4, 1921.)

L–85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

(Minutes of Court—April 4, 1921—Order Overruling Motion in Arrest of Judgment and Motion to Set Aside Verdict, and Motion for a New Trial.)

The defendant's motion in arrest of judgment and motion to set aside verdict herein, having been submitted to the Court and the Court having fully considered the same, and being fully advised in the premises, does now order that said motion in arrest of judgment and motion to set aside verdict herein, be and the same are hereby overruled, to which ruling of the Court the defendant notes an exception.

And, it is further ordered by the Court that the defendant's motion for a new trial heretofore submitted to the Court, be and the same is hereby overruled—to which ruling of the Court the defendant notes an exception. [30]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Order Extending Time to File Bill of Exceptions to and Including May 3, 1921.

It appearing that no other extension of time has been made by stipulation or order for the purpose of allowing the defendant reasonable time within which to prepare and serve its bill of exceptions, the motions to set aside verdict, in arrest of judgment and for new trial having been overruled April 4, 1921—

IT IS HEREBY ORDERED that the above defendant shall have thirty (30) days from said April 4, 1921, within which to serve upon the plaintiff or his counsel a bill of exceptions, to wit, unto and including Tuesday, May 3, 1921.

Dated this 11th day of April, 1921.

WM. H. SAWTELLE,
Judge.

[Endorsements]: Copy received April 6, 1921.
O'SULLIVAN & MORGAN,
Attys. for Plaintiff.

Filed April 11, 1921. C. R. McFall, Clerk. [31]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Application for Fixing Amount of Supersedeas Bond.

The defendant in the above cause will petition this Court for a writ of error, and respectfully requests the Court to make an order fixing the amount of the supersedeas bond to be furnished by the defendant; and further,

Respectfully requests that the said amount of said bond be fixed at the sum of Eighty-five Hundred Dollars ($8,500).

FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsements]: Copy received April 14, 1921.
O'SULLIVAN & MORGAN,
Attorneys for Plaintiff.

Filed April 15, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [32]

At a regular term, to wit, the April Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said court in the Federal Building, city of Phoenix, State and District of Arizona, on Monday, the 18th day of April, A. D. 1921—Honorable WILLIAM H. SAWTELLE, District Judge, presiding.

(Minute Entry—April 18th, 1921.)

L–85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

(Minutes of Court—April 18, 1921—Order Fixing Amount of Supersedeas Bond.)

On application of the defendant, IT IS ORDERED that supersedeas bond on writ of error herein be fixed at the sum of Eight Thousand Five Hundred Dollars ($8,500.00), and that upon the giving of such bond by the defendant, in accordance with the law and the practice and rules of this court, execution of the judgment herein may be stayed pending the determination of this case by the Circuit Court of Appeals. [33]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

The defendant's motion to strike certain portions of plaintiff's complaint having been overruled as to certain parties, especially those portions relating to the pleading of special damages as an issue, and defendant's demurrers having been overruled, and exceptions to said rulings having been made and allowed; afterwards, to wit, on November twenty-sixth, 1920, at a term of the above court held at Prescott, in the District of Arizona, before his Honor, William H. Sawtelle, District Judge, the cause came on to be tried by jury, plaintiff being represented by O'Sullivan & Morgan, and the defendant by Favour & Cornick. Upon trial all witnesses were duly sworn; the plaintiff called as a witness John T. Littlejohn, who testified as follows:

Testimony of John T. Littlejohn, for Plaintiff.

I was born in Ohio; am fifty-seven years old; am married; have been living in Arizona about nine years and in Cottonwood, Arizona, about three

(Testimony of John T. Littlejohn.)

years. I started working for the United Verde Extension Mining Company about three years [34] ago, first on construction of their Smelter Plant. On June second, 1920, I was working in the bull gang under Mr. Wright as foreman; had been working in this gang since the smelter was started on August first, 1919. I did all kinds of work, around the yards and the general office, cleaning up, moving machinery, unloading cars, drilling concrete, swinging a jack-hammer, installing machinery—anything like that as ordered by the boss. The smelter plant consists of the smelter, sample-mill, machine-shops and all those works. There were about nine men in the gang and a few days prior to June second, 1920, I was leveling up gravel and such stuff around the general office there. I had drilled out the whole end of the sample-mill about a month before; we had to run concrete in for putting up the rolls. This concrete construction was an addition to the sample-mill. The sample-mill was used to crush ore for the smelter and the crushers operate with motor-power. I had not been working there the day before, but on June second five of us were taken over to the sample-mill and we jacked up the rolls; Wright then told Clark and Stoven to go below and put the tops on the bolts that go through the concrete to hold it, and told me and the other boys to put in the bolts. I grabbed a bolt and went on the staging and the plank cracked and I didn't know any more until I was getting into the car, helped by two men, to

(Testimony of John T. Littlejohn.)
go to the hospital. The bolt was about four feet long and two inches in diameter. I don't remember falling; I would not say I fell because I do not know. The concrete pit was about ten feet wide and ten feet deep where the boards crossed it; it was built as a conveyor to run ore from the rolls into the sample-mill, that was why the end of the mill was cut out. I had to walk on the planks across the aisle to put in the bolt. There were three planks, side by side, twelve feet by one foot by two (2) [35] inches. I held the bolt up, the plank broke and I lost consciousness until I was being put in the automobile to be taken to the company hospital. Dr. Moore dressed my head there. "My skull was broke there in front," over the left eye; the back of my neck and of my head is sore; there is a lump on my skull and my nerves is gone; my head aches and my neck hurts ever since. I never had headache or backache or bad nerves before. There was a big knot in front near as big as the end of my thumb, which hurt all the time; I couldn't wear my hat only just back. Three months from the time Dr. Moore told me I could go back to work the knot broke and three little slivers of bone the size of the end of a small pen came out. Then my head got better in front; the back of my head still hurt. The back of my head is crushed, I guess; there is a raised place in the skull.

Mr. O'SULLIVAN.—(To Jury.) "Feel this man's head, Gentlemen."

The COURT.—"If any of the jurors desire to

(Testimony of John T. Littlejohn.)

make a personal inspection you may do so."

After having my head dressed at the hospital I went home, about a mile away, and went back to the hospital every day for fourteen days, when Dr. Moore pronounced me well enough to go to work. I still went to the hospital to have my head treated. My neck, head and shoulders hurt me the whole time; I thought I had an inward rupture, as it hurt me down in the groin when I lifted anything; but I gave that up, as being the cords from my head, I guess. I went back to work by permission of the doctor and was kept at light work as near as the boss could for seventeen days and five hours.

PLAINTIFF'S ATTORNEY.—"And why didn't you work longer?" A. "They laid me off." (3) [36]

DEFENDANT'S ATTORNEY.—"We desire to enter an objection to that on the ground that was one of the matters stricken from the complaint and it is not proper for counsel to refer to that. It is absolutely immaterial in this case."

PLAINTIFF'S ATTORNEY.—"We have a right to show . . .

COURT.—"I don't know that it was by reason of his being physically incapacitated. I think it goes to that."

DEFENDANT'S ATTORNEY.—"Unless he shows that point, I think the conclusion of the witness is not to be taken."

COURT.—"He may state whether or not he was able to continue at work."

(Testimony of John T. Littlejohn.)

I quit by request and got my time; "I suppose because I wasn't able to do the work."

DEFENDANT'S ATTORNEY.—"I move that that be stricken out."

The COURT.—"No, if he don't know positively, don't state an opinion, that may be stricken."

The WITNESS.—"Well, I can tell what was said to me by the authorities if that will do any good."

The COURT.—"Well, you may tell that."

The WITNESS.—"The timekeeper—Mr. Wright told me that the timekeeper wanted to see me, so I goes to the office and went in and he said he had orders to lay me off till I felt able to sign the release. He says, 'I will give you this check and that will be all.' That was the check for my half month's work, for the fifteen days, and he give me that check, and he says, 'That will be all.' Then I taken the matter up with the claim agent, Mr. Johnson. Well, he first ignored me when I went (4) [37] up there, and said, 'I cannot do anything for you. Dr. Moore pronounced you all O. K.' I said, 'I cannot help what Dr. Moore pronounced me, my head and neck hurts me worse now than it did at first.' He said, 'You go back to Dr. Moore and let him examine you, and unless he says you are all right you come back here again.' After he said he couldn't do anything for me he turned around and said that. Well, I goes back and seen Dr. Moore again. He examined me again. Mr. Moore said as far as he is concerned himself he

(Testimony of John T. Littlejohn.)

pronounced me sound, and I went back home. The next pay-day after that Dr. Moore and Mr. Thompson, the claim agent, came out to my place, and Mr. Thompson suggested that I should go up to the Verde and be examined by that gentleman sitting right there—I have forgotten his name—regardless of Dr. Moore. I told him all right. He said he would take me up and back. I said, 'All right.' I wasn't contrary; I didn't want to be; I didn't care whether they were company's doctors; so I went up there. That doctor proposed that I should go to Jerome next day and have an X-ray picture taken, then he would make a thorough examination of me; so I went, according to that, and they taken the X-ray pictures, and I went in and he give me a thorough examination. Then Mr. Thompson walked over to me after the doctor got through examining me, and he said, 'Littlejohn,' he says, 'I don't want you to think that we ain't to do—that I ain't going to do fair with you. I have no other orders only to treat the men fair.' He says, 'Mr. Kingdon gives me orders to treat his men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don't want you to think'—

Mr. FAVOUR.—"I object to this. We don't want to prolong this trial. This is kind of a garrulous statement of gossip (5) [38] of what took place and has no bearing on the case. We don't want to keep objecting, but I do object to this long

(Testimony of John T. Littlejohn.)

statement of matters that are highly prejudicial and have no bearing on the case, and I ask that the witness be questioned as to the issues involved here."

The COURT.—"Any conversation with reference to settlement would not be admissible."

The WITNESS.—"I just had one or two more words and I would have been through."

Mr. FAVOUR.—"May I ask that that be stricken out, that statement?"

The COURT.—"No, it wasn't objected to; it may stand."

Mr. FAVOUR.—"Well, I ask particularly that the matters concerning that the company is insured, be stricken out."

The COURT.—"No, I deny the motion."

Mr. FAVOUR.—"Note an exception to that, please."

The COURT.—"The reason for the denial is, that there was no objection to it until after it was all stated."

Mr. FAVOUR.—"I couldn't object to that, it wasn't in response to any question. I don't know what is in this witness' mind. If he starts answering a question and rambles off and makes a statement prejudicial to the defendant—"

The COURT.—"Well, you heard him when he started to ramble and didn't make any objection."

Mr. FAVOUR.—"I ask now that it be stricken out."

The COURT.—"Well, I deny the motion."

(Testimony of John T. Littlejohn.)

Mr. O'SULLIVAN.—Q. "Now, Mr. Littlejohn, what did Mr. Johnson, the claim agent of the company, say as to why you were laid off?"

Mr. FAVOUR.—"I object to that, if your Honor pleases." (6) [39]

The COURT.—"The objection is sustained as not going to prove any issue in the case. I will let stand anything that has been said without objection, but I will not let anything more be said over an objection."

Mr. FAVOUR.—"We make the further objection that Mr. Johnson, who made that statement is now dead, and therefore any statement he made to the witness would not be admitted, unless there was an admission of some kind."

The COURT.—"I didn't know that at the time his name was mentioned, before the witness got through with his testimony and no objection was made."

Mr. FAVOUR.—"I just mention that."

The COURT.—"You may have that as one of the grounds of the objection."

I suffer with the back of my head and neck, have had headache every day, cannot turn my neck around any further than (indicating) or back; it hurts when I do it. My shoulders and my back hurts once in a while. I never had head or backache before. I have not worked except the seventeen days. I wasn't able to get out and hunt me a job; there was no light work I could get around there. I wasn't able to pitch hay and wouldn't

(Testimony of John T. Littlejohn.)
undertake it. I could not do clerical work.

Since the injury I have slept good some nights and not at all, others. I never had insomnia before. I am nervous, my hands and legs tremble, which I never did before. I lost fourteen pounds the fifteen days I was off.

Eight stitches were put in my head. I had good health all my life. I was earning $4.60 a day at the time of the accident. I have not earned any money since, except the seventeen days. I had no idea the plank would break when I walked on it. (7) [40]

Cross-examination of JOHN T. LITTLEJOHN.

The defendant then requested an examination by its physicians of plaintiff's head, as it had been exhibited to the jury.

The defendant also requested an examination of plaintiff's physical condition generally because it had been placed in evidence, which was objected to by plaintiff's counsel.

The COURT.—"Well, plaintiff having objected to submitting himself to examination by two disinterested physicians to be appointed by the Court, the objection is sustained."

(Exception by defendant.)

My trade is laboring man; I have worked around ore furnaces and farmed. For the seventeen days I did the same kind of work as before, only it was the light work.

(Noon recess.)

The defendant's counsel thereupon moved the

(Testimony of John T. Littlejohn.)

Court to declare a mistrial on account of the statement of plaintiff that Mr. Thompson told him, "they have them all insured" (quoted in full above); on the ground that said statement was prejudicial and could not be corrected by striking the evidence, (the evidence not having been excluded or stricken by the Court). Motion overruled and exception taken.

The concrete pit was under construction; it was on the outside of the sample-mill and an addition was being made to it; it was not under ~~the~~ roof at that time.

I walked out on the plank; there were two men standing on it who fell at the same time. Dr. Moore said the injury was to the skull; Dr. Thigpen, another company doctor, told me it was fractured. I knew it was fractured when them bones came out. They worked out themselves; three-cornered bones, flat. My head, neck and shoulders hurt me most of the time. The pain in (8) [41] the groin is gone. My nerves are worse since I stopped work. I talked my condition with my family of course. Never had a doctor but once in my life before. I got over the bruise on my leg. I haven't tried to get a job; carried a little water once in a while helping around the house.

Testimony of Dr. J. B. McNally, for Plaintiff.

Qualifications admitted. I made an examination of Littlejohn in my office in early September and later in that month. I found him suffering from

(Testimony of Dr. J. B. McNally.)

an ulcerated injury to his forehead, the first time. From the history he gave, with what I could see, I concluded there was something behind the surface that caused it not to heal, some irritation; also I found a depression on the left side of his head in the posterior region, which was not sore; also noticed a fine or muscular tremor all over his body; his neck muscles were apparently very tender, slightly rigid where attached to the bone. I was not able to account for the tremor; he told me it had followed the injury and I concluded there was probably a concussion of the brain or some part thereof that may have set up the tremor. I examined him again within the last week; his general condition was about the same; of course his head was healed and he gave me the history of taking out the little bones. His nervous condition was very slightly exaggerated, I think. He complained of not being able to sleep, headache and tenderness in back of head and neck.

Cross-examination of Dr. J. B. McNALLY.

I went into his history carefully. He told me about his health and his injury. He came for examination, not for treatment, and he didn't ask to be treated. I gave him medicine to help him sleep once. This infected area on the forehead (9) [42] had entirely healed when he came the last time. I told him, the first time, I thought the bone was injured some. I did not know there were fragments of bone detached; the bone could be injured without fragments detached. That would

(Testimony of Dr. J. B. McNally.)

not in itself be a serious injury. It might or might not have produced trouble deeper seated. The little detached particles from the outer plate were what kept it sore so long. The depression on the left of the head was slight, with no appearance of soreness. Sometimes such depressions are congenital. I could not say whether it was a result of the fall; if it were not sore during the first two weeks I would say it was not the result of the fall. I think there was a concussion there. A concussion is a jarring of the brain with a disturbance of the cells. It takes place to some degree, I believe, when one is knocked senseless. It is not always attended by serious results. You can have a concussion with, and without, a concurring fracture of the skull.

I made no X-rays. I don't think this injury caused any fracture of the inner table of the skull, no projecting in toward the brain substance. I made tests of his nervous condition and found the general tremor, which is only a symptom and not a disease; you may have it with many diseases.

WITNESS.—"Well, I believe the cells of the brain were disarranged and their function, physiological function, was disturbed."

DEFENDANT'S ATTORNEY.—"And that, you say, will continue, or won't it clear up?"

WITNESS.—"I think it will continue in a man of his age."

You don't see much of it (tremor) in men of fifty-seven years. It would be better if he were

(Testimony of Dr. J. B. McNally.)
under observation (10) [43] of a physician, than talking over his condition in his family. He didn't tell me whether he was under care of a physician at the time he was examined by me.

He might or might not have been rendered unconscious at the time of the fall, to produce the condition I found; concussion is usually accompanied by unconsciousness and vomiting, but not always. I think there would have been a dilation of his eye pupils. A great majority of concussions clear up.

His mind appeared perfectly normal for a man of his education, and there was no trouble with his organic body, heart, lungs, etc. It was just the shock to his nervous system. Q. "Won't that clear up?" A. "That I cannot tell." Q. "Wouldn't you say, in your opinion, it will clear up?" A. "I wouldn't say at his age, that tremor." It is not usual for people at his age to have a tremor, but it isn't unusual for people ten years older.

The tremor could be due to any one of many causes, such as worry, malaria, alcoholism; we have hysterical tremor and paralysis agitans, peculiar to the aged. My diagnosis was based on his statements to me and the injury and what he told me.

Testimony of Frank Clark, for Plaintiff.

I have lived in Cottonwood for over a year, know Mr. Littlejohn, was employed by the United Verde Extension Mining Company on June second, 1920.

(Testimony of Frank Clark.)

I was on the bull gang. I was there when the accident occurred. The foreman said to put in the bolts to anchor the concrete forms. Stoven and I went down beneath. I heard the plank break, saw a man hanging, he was pulled up from above. Some man said, "Are you hurt, John?" Littlejohn didn't answer. He was on his back. I took the bolt off his feet. They (11) [44] took him out into the car. I heard the break but did not hear any fall. The pit was nine or ten feet deep. The bolt, I have no idea, weighed forty to sixty pounds. I worked in the gang with Littlejohn over six months and he seemed to be able to keep up his part of the work. I have seen him several times since the accident. The planks were two by twelve, they call them.

Testimony of Robert E. Lee, for Plaintiff.

I live at Clemenceau. Have known Littlejohn about three years. I was driving the team, under orders of Mr. Wright, working for the company at the time of the accident. I saw a part of it. I was standing up pretty close; they were just fixing to put these bolts in when I drove up. I picked up a bolt and walked in and stood with one foot on the plank and the other on the form. I couldn't tell who walked out or stepped on the plank, but it broke and away he went. I fell backwards and any across the plank. I didn't fall into the pit. I don't remember seeing Littlejohn on the plank. I saw him being led up, then I went

(Testimony of Robert E. Lee.)

out to the team. There were two or three planks, two by twelves, about fourteen feet long. The pit was ten feet wide and nine or ten feet deep.

Cross-examination of ROBERT E. LEE.

I saw them come on top, just to the last step up to the level. Mr. Littlejohn was walking.

Redirect Examination of ROBERT E. LEE.

Littlejohn was between two men.

The COURT.—I find from an examination of the reporter's notes here that this witness, the plaintiff, made a statement to which counsel for defendant objected, in reply to a question or permission of the Court, and therefore, not having (12) [45] been asked for by counsel on either side and not being responsive to the subject he was discussing at the time he was given permission by the Court to proceed with his statement, I think there are certain portions of this that I shall strike out. He proceeded to tell what Mr. Thompson—well, first the witness said, "I can tell what was said to me by the authorities if that would do any good," and the Court said, "You may tell that." I supposed he had reference to whether he—to the matter of his being able to work, and he went ahead to say what Mr. Thompson told him and what the doctor told him and then he proceeded to make a statement which neither the Court nor counsel on either side could have anticipated, and therefore I exclude this portion of his testimony entirely, "Then Mr. Thompson walked over to me after the doctor got through examining me and said, 'Little-

(Testimony of Robert E. Lee.)

john, I don't want you to think that we ain't—that I ain't going to do fair with you. I have no other orders only to treat the men fair.' He says, 'Mr. Kingdon gives me orders to treat the men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don't want you to think' "—and then he was stopped. Now all that I exclude because in the first place any discussion by itself with the expectation of the efforts to make a satisfactory and mutual arrangement for settlement is never admissible in the trial of a law suit. People have a right to settle their differences and to make their peace and to avoid litigation, and any statement made by either party while that is in progress is never admissible in a law suit and is no admission of fault or liability on the part of either, and the question as to whether these men were insured is wholly immaterial in this case. You can readily see why that (13) [46] might be so. In the first place, it might be a case where the insurance could never be collected, the insurance company might be insolvent or they might refuse to pay, many reasons why that is not admissible, and therefore plaintiff's statement which was not called for by counsel on either side, and I didn't anticipate it when I permitted him to make a statement with reference to his physical condition, therefore you will not consider it at all for any purpose. Make up your verdict wholly independent of that statement."

Testimony of Harry Garrison, for Plaintiff.

I have lived in Cottonwood a little over three years; am in the auto service station business; have known Littlejohn since 1913. On June second I heard Mr. Littlejohn was hurt and being an old friend of his, I naturally went to see him. I went to his house; he was in bed all bandaged up and seemed to be very nervous. The next day I took him up to the hospital in an automobile and the doctor dressed his wounds. I sat in the other room with the door open. I saw a red plotch on his head. I saw Littlejohn every two or three days between then and now; he is apparently a changed man from what he was before, physically and mentally. He has been around my shop when I was working and when I asked him to hand me a tool he would miss it and grab around before he got it, shaking all the time. I drove him into Prescott a few days ago to attend the trial. Something happened from which I could tell the jury about his physical condition. (Objection made by defendant to any testimony thereof as remote. The plaintiff then avowed he expected to prove Littlejohn tried to pump air into a tire and couldn't do it. Objection sustained and jury instructed to disregard that evidence.) During the three years I knew Littlejohn previous to this accident, "He was apparently healthy and sound." (14) [47]

Mr. CORNICK.—"We object to that, your Honor, that it is a conclusion beyond the ability of this witness."

(Testimony of Harry Garrison.)

Mr. FAVOUR.—"It is quite apparent he is hardly in a position to pass on this man. He is a friend. He hasn't seen him when he was working, he certainly hasn't seen him in the evening, and he says occasionally, and he is unqualified to pass on that. It is rather with reluctance that the Courts are allowed to pass on the impression whether the man is sound or unsound, but the courts have let that go in because that is a matter of common repute. When you get down to the physical condition of a man you get down to a hundred and one different elements that even a man skilled in medicine has difficulty in determining."

The COURT.—"I think the witness' statement that he had the appearance of a healthy man may stand and the other portion of his answer, that he was sound—no, I think a witness may state that a man has a healthy appearance. I think that is an opinion that a layman may give. As to whether he is physically sound, that is an opinion that he may not express."

Mr. FAVOUR.—"Note an exception."

The COURT.—"Very well, you may have an exception."

I never saw Littlejohn at work. His nervousness and shaking before the injury were not noticeable.

Testimony of Sarah Littlejohn, for Plaintiff.

I am the wife of plaintiff; married thirty years ago; we have lived in Arizona, I guess, about three

(Testimony of Sarah Littlejohn.)

years, near Cottonwood about one mile from the United Verde Extension Smelter. He worked for the company. On June second, 1920, I saw Mr. Littlejohn when he was getting out of the car about noon (15) [48] in front of our gate. Mr. Newton was the only one with him. Mr. Littlejohn stepped out with his dinner-pail in his hand, his head bandaged, one eye standing up, and his face bloodshot. He was very nervous and shaky and I helped him into the house and put him to bed. He looked like a dead man. His left eye stood open and never closed when he went to sleep. There was a big lump on the back of his head; his left leg was black and blood shotten to his heel. He went to see the doctor every morning for dressing his wound, and one morning the bandage came off and I saw the place on his head and it was red and running. The doctoring kept up several days. I took care of him.

"Q. Did he manifest any signs of pain?"

DEFENDANT'S ATTORNEY.—"We object to that as leading and suggestive."

(Overruled.)

"A. Yes, sir."

DEFENDANT'S ATTORNEY.—"Note an exception to this line of testimony."

The COURT.—"Yes."

PLAINTIFF'S ATTORNEY.—"Please tell the jury what you noticed by way of your husband's manifestations of pain after his injury."

"A. Well, he was restless of a night and when he

(Testimony of Sarah Littlejohn.)

was sleeping he moaned in his sleep." He has not been working since his injury. I have observed a nervous condition; he is restless at night, gets up and walks the floor and puts his hand to his head. His hand shakes; he cannot get his coffee to his mouth without shaking.

Since we have been here, a few nights ago, something out of the ordinary occurred. (16) [49]

PLAINTIFF'S ATTORNEY.—"Well, what happened?"

DEFENDANT'S ATTORNEY.—"We object, your Honor, unless it is connected up."

The COURT.—"You affirm you propose to show it has something to do with the injury?"

PLAINTIFF'S ATTORNEY.—"With his physical condition, yes, your Honor."

The COURT.—"Overrule the objection."

A. "Well, he was restless, he couldn't sleep; he walked the floor as he did before, holding his neck, his hands on the back of his head. I was restless, too. I said, 'Why can't you sleep?' "

Before this injury and for thirty years he did all kinds of heavy work, farming; he was generally a hard-working man; never sick or nervous or sleepless and worked continuously. Since this injury he has helped around the house at times, carrying in water, and looking up a little stove wood, but not all the time.

PLAINTIFF'S ATTORNEY.—"Why?"

DEFENDANT'S ATTORNEY.—"We object."

(Overruled.)

(Testimony of Sarah Littlejohn.)

A. "Well, he was suffering pain."

DEFENDANT'S ATTORNEY.—"We object to that and ask that it be stricken."

The COURT.—"Overruled. Well, I will sustain that; I will sustain the objection and let her state—well, I hate to make so many suggestions. I will just sustain the objection.

Cross-examination of SARAH LITTLEJOHN.

Mr. Littlejohn was a farmer when we were married in Ohio and in coal mines in winter for about twenty years. When he came to Phoenix he worked on a farm, on putting up poles for electric line, cleaning streets, on buildings, wheeling concrete, (18) [50] always doing heavy work. We haven't talked much about this lawsuit; he speaks to me about it, wishes it was settled. He had a doctor once in Ohio; he had symptoms of malaria. He had no doctors since the injury except the company doctors and Dr. McNally.

Thereupon plaintiff offered in evidence the American Mortality Tables showing the expectancy of life.

Mr. CORNICK.—"We object, your Honor, for several reasons. In the first place, we object because those mortality tables are based in this computation upon the average man, following the average walks of life. This plaintiff has not brought himself within the character of persons upon whom those mortality tables are based. In the second place, because the plaintiff has not located himself within the character of persons from whom the

mortality tables are taken; in other words, he has not shown anything upon which there may be drawn any conclusion as to whether he is one of that character, and if so, as within what class of those general individuals from whom that table is taken he would fall, so that there would be no method of application of those tables. In the third place, because there is no evidence in the record which brings the plaintiff within the application of the mortality tables. In other words, there is no evidence of permanent injury, there is no evidence of the degree of injury, so that there could be no application of these tables to the condition of the plaintiff as shown."

The COURT.—"Well, I should charge the jury that unless they believe that the injuries testified to, or some of them, are permanent injuries, then the mortality tables would have no effect whatever, and I should also state the class of persons of whom that table is made or from whom it is made, and ask them to find in the first place whether or not he comes within that class, and, if so, then they may consider the table." (19) [51]

Mr. CORNICK.—"In the fourth place, for the fourth ground for their exclusion, that the plaintiff is shown to have performed labor and shown to have been capable of the performance of labor since the happening of the accident, so that there is no evidence upon which the jury could classify him or make any application of the tables to his injury."

The COURT.—"Very well, they will be admitted,

under proper instructions of the Court to the jury as to their weight."

Mr. FAVOUR.—"We desire to note an exception."

The COURT.—"Very well. Well, the expectancy of a man 57, I think that is his age, is how much?"

Mr. MORGAN.—The American-Mortality tables, 16 and 5/100 years.

The COURT.—"All right."

Mr. CORNICK.—"To which, of course, we are objecting."

The COURT.—"Yes."

Mr. CORNICK.—"And note an exception."

The COURT.—"You may have an exception."

Thereupon the defendant's attorney requested a physical examination.

Mr. FAVOUR.—"We desire time to have that examination by our physician of the plaintiff, and desire the direction of the Court as to what length he may go to in that examination.

The COURT.—"In the absence of an authority on the subject, I think I will be compelled on objection of the plaintiff to restrict the examination to that portion of the body which was submitted by the plaintiff to inspection." (20) [52]

Mr. CORNICK.—"We ask leave, in making the examination of the head of the plaintiff, which was submitted to the jury, to make such examination in addition as may be necessary to determine what effect, if any, upon the condition complained of in

this case those conditions of the skull or of the head would have."

The COURT.—"In other words, you think that an X-ray should be made?"

Mr. CORNICK.—"No, I think, your Honor, that the conditions of the head of themselves, especially, coupled with the allegations of the complaint and the proof introduced might—an examination limited to the skull might show nothing, but if an examination of the conditions which are alleged to be the result of those conditions is not made, we have no opportunity to rebut that evidence."

The COURT.—"What do you desire to do?"

Mr. CORNICK.—"We desire to examine the plaintiff in so far as the condition of his head may make it necessary in order to show what the result of that alleged injury was."

The COURT.—"I still do not understand what you want to do. How do you want to examine him?

Mr. CORNICK.—"We want to examine his head first; then if it is found necessary to examine the state of his nerve to tell the condition of his head, then we desire to examine his nerve."

The COURT.—"Well, it wouldn't affect any injury to the head, the injury to the head might affect the nerve."

Mr. CORNICK.—"Yes, and we want to find out if the condition of the head probably caused the other condition complained of." (21) [53]

The COURT.—"Well, I am no physician. I

cannot dictate how they should examine him. They may examine his head for all purposes, but I don't believe that I have any legal authority to require him to submit that portion of his body to examination which he himself did not deem proper to submit."

Mr. CORNICK.—"Now, the shaking of his hand, your Honor, may we not have the right to examine him?"

The COURT.—"Why, you on cross-examination, could ask him to hold out his hand so that the physician could see that."

Mr. CORNICK.—"Well, he claims that condition is due to the injuries to his head."

The COURT.—"Well, examine his head, then."

Mr. CORNICK.—"In other words, your Honor, I do not make myself clear, I am sure. We desire to examine such portions of his body—"

The COURT.—"I understand you now clearly. You want to examine his whole body, if necessary?"

Mr. CORNICK.—"If necessary."

The COURT.—"Well, I haven't any authority to grant that permission. He is the only man that can, and he denies that authority through his counsel, so you are confined to an examination of those portions of his body which he exhibited."

Mr. CORNICK.—"We except to that ruling of the Court, if your Honor please."

Thereupon a short recess was taken.

The COURT.—"Have you completed your examination, Gentlemen?"

(Testimony of G. S. Purtyman.)

DEFENDANT'S ATTORNEY.—"We have examined as far as the head alone, your Honor." (22) [54]

DEFENDANT'S CASE.

Testimony of G. S. Purtyman, for Defendant.

I was employed on June second in the bull gang working on this concrete pit. The pit was seven and one-half to eight and one-half feet deep and between ten and eleven feet wide. I was on the plank when Mr. Littlejohn stepped on it. I was on the plank with him when it broke. I threw myself back and caught on the other board. I got a scalp wound and bruised leg. I looked down and saw the plaintiff walking between two men out of the pit. I got into the car, too, and went to the hospital and was in the room when his wounds were dressed. He walked into the hospital assisted by Mr. Wright and talked some. This pit was outside the sample-mill, at the end of the building. There was no power there. We were working on the construction, putting up the rolls. The planks were put across so we could work back and forth across the pit.

Testimony of Dr. James R. Moore, for Defendant.

Defendant's attorney stated purpose to examine witness as the physician who examined plaintiff after the accident and down to July twenty-second.

PLAINTIFF'S ATTORNEY.—"No objection at all."

(Testimony of Dr. James R. Moore.)

I am admitted to practice as a physician in Arizona. I am a graduate physician of the University of Southern California; have practiced since 1916; about a year in Cananea, Mexico, three months with the city of Cleveland, Ohio, sixteen months in the United States Army and since August, a year ago with the United Verde Extension Mining Company. I treated the plaintiff for an injury on June second, 1920. Plaintiff came in that morning with Mr. Purtyman and Mr. Wright. Plaintiff had a cut on the left side of forehead, several scratches and bruises above left side of face, left elbow bruised, also left leg above knee. A nurse was helping me clean up the injuries of the two men. The forehead wound was thoroughly cleaned and sutured or sewed up. This cut was about one to one and one-half inches long, Y-shaped, (23) [55] extending down to the covering of the bone of the skull, narrowing so that the rent in the skull covering was not over three-fourths of an inch. Plaintiff was conscious and talked, no anesthetic was given. He answered my questions rationally and I did not feel called upon to go further into his mental condition. He showed no signs of vomiting. I examined his eye pupils, as we always do in head injuries, and there was no abnormality. I looked for other injuries, and found none except as I have described. He did not complain of injury to the back of his head, that I recall. I dressed the wound for him on succeeding days. His condition showed such progress that on June fifteenth I gave him a

(Testimony of Dr. James R. Moore.)

card to go to work. The cut had practically healed except for a slight amount of oozing. All other scratches had healed and he made no complaint about his leg. He was to return for dressing and I think he did so for two or three times. The last time I told him that it was practically healed. About two weeks later he returned and I examined him; he complained of some pain in the back of his head. The head scar was healed and apparently in healthy condition. I examined the rest of his head and found nothing unusual. I found no stiffness or rigidity of his head and neck; he complained of pain when I was bringing out these points. Later we had X-rays made by the United Verde Copper Company hospital; two of them are in the court-room, I believe. We took them, because he complained of his neck and head, to see if there was any condition we might not have found. I have an ordinary knowledge of X-ray plates. (24) [56]

DEFENDANT'S ATTORNEY.—"From your examination, from your experience, what do they show for you?"

PLAINTIFF'S ATTORNEY.—"We object to that. If the plates were taken they speak for themselves."

The COURT.—"The plates are the best evidence."

DEFENDANT'S ATTORNEY.—"Yes."

I had no occasion to change my previous opinion by reason of these plates. The brain consists of nerve tissue and it is contained in the skull which

(Testimony of Dr. James R. Moore.)

is a bony covering consisting of two layers, two dense outer layers, and a spongy mid-portion. Fractures of the skull owe their importance to their effect upon the brain. The symptoms which make themselves manifest in cases of fracture of the skull are those of pressure within the skull. One is unconsciousness, with increasing pressure, vomiting and headache. There is frequently a difference in the size of the pupils of the two eyes. If there is splintering of the bone on the inside of the skull, there will be pressure on the surface of the brain, probably followed by paralysis, or it may be irritating only and cause increased activity. There may be a blood lesion there followed by other symptoms. If Mr. Littlejohn had sustained a fracture, and it had been a simple fracture he might be presumed to have no symptoms whatever, referable to pressure within the skull. People often have their skulls fractured with no harmful results whatever unless there is a splintering of the inner cable or a pouring out of blood, causing an increase of pressure within the skull. Knowing Mr. Littlejohn, as I do, and having treated him, I consider that he has laid undue emphasis upon the importance of the injuries and possible consequences which might come from them and he is probably worrying more over his condition than the extent of these injuries would warrant. I (25) [57] do not believe there will be any permanent disability result from his injury.

(Testimony of Dr. James R. Moore.)

Cross-examination of Dr. JAMES R. MOORE.

I am thirty years old. I am still employed by the United Verde Extension Mining Company. I examined Mr. Littlejohn's head here in the courtroom and did not take his pulse; and found an irregularity in the back of the head on the left side. There were two X-rays taken of the skull, one from before backwards and one from side to side and one of the neck. The entire skull was included in both X-rays. I made no special examination of Mr. Littlejohn for any mental disturbance. The wound was healed up about a month after the accident. There was no infection then. If there were detached bones in the wound it would probably cause the wound to open again. There would be a sore which would continue until the bones came out. Not all fractures would show in an X-ray. I couldn't say that a great many fractures would not show in X-rays. I had not examined Mr. Littlejohn since the last X-rays were taken until I examined him in the courtroom, when I made as full an examination of his skull as circumstances would permit.

Redirect Examination of Dr. JAMES R. MOORE.

The skull is subject to irregularities which are not the same in any two individuals, and in my opinion the irregularity in Mr. Littlejohn's skull is congenital or a natural disfiguration. I do not believe it would be possible for a man to suffer such a depression from an accident and not suffer any immediate ills or ill effects therefrom. He would

(Testimony of Dr. James R. Moore.)
have known if he had received an injury sufficient to cause such a depression. I think this depression is a normal contour of the skull. He was born that way. (26) [58]

Recross-examination of Dr. JAMES R. MOORE.

In an injury by countrecoup it is supposed that a blow in one portion of the skull may cause a fracture at a distant portion or on the opposite side of the skull. While it is admitted in theory it is very rare in practice.

Redirect Examination of Dr. JAMES R. MOORE.

I did not find any such condition in this man.

Testimony of Robert E. Lee, for Defendant.

I have known Mr. Littlejohn for three years. He has always talked loud and quick and through his nose. I have not paid any attention as to whether there is any change in his voice.

Testimony of Dr. R. H. Thigpen, for Defendant.

Qualifications admitted by plaintiff. I have been a practicing physician since 1904. I was practicing in Jerome during the summer of 1920, as surgeon in charge of the medical department. I examined Mr. Littlejohn in my office in the Shea Building in the presence of Dr. James Moore. I found a subject who in my opinion was a case of premature senility who had a recent injury. I based my opinion on the fact that his temporal arteries were tortuous and that his brachial arteries were plainly visible. He had, in each eye, a well-developed senile white ring and he had the in-

(Testimony of Dr. R. H. Thigpen.)

tention tremor of senility. When he held his hands out to you and had his attention called to them there was quite a tremor. When at rest there was no tremor. His voice was unsteady, peculiar, broken, which you noticed in his testimony. The pulse pressure, blood pressure (27) [59] was slightly increased over normal. I found a scar, Y-shaped, over the left eye. Between these two diverging limbs was a small hard, slight elevation which felt not unlike a bony ridge. The scar was quite inactive and there was no inflamation. The patient complained of tenderness around the scar. He mentioned that he had been unable to pull his hat down over the scar and stated that the shoulder-neck group of muscles were tender under pressure. I moved his head in all directions. It moved freely and I did not detect or was unable to demonstrate any rigidity or stiffness of the muscles. His nervous reflexes, the knee jerk reflex was normal. He had no Babinsky sign. That is in striking the bottom of the feet his big toes did not turn up instead of down. In having him stand with his feet close together and his eyes closed he swayed considerably and apparently would have fallen had he not been supported and with his eyes closed in asking him to bring his finger-tip to the point of his nose, his muscular co-ordination was not good. That seemed to me to be in line with his other symptoms of premature senility. I had some X-ray plates made. Something went wrong in the development of the first exposure and another was taken. I sent them

(Testimony of Dr. R. H. Thigpen.)

to Dr. W. W. Watkins. They showed the forehead where the scar was located. Dr. Watkins is a Roentgenologist and devotes practically all of his time to the study of X-rays. From the results of these pictures I had no cause to change my previous diagnosis. These pictures were made at the United Verde Copper Company hospital by Dr. Kaull. I examined Mr. Littlejohn's head in the courtroom this afternoon in a superficial manner. I found the scar I examined on July twenty-second and that the little bony ridge had disappeared. I found what might, with some stretch of imagination, be termed a depression or irregularity along about the point of union of the parietal bone with the occipital bone on the left. In my (28) [60] opinion it is simply the union of this parietal bone and this occipital bone. They suture together like a saw-union and it is possible for that to be depressed or slightly elevated. It is common in people as the skull is quite elastic. If a child is permitted to lie on one side constantly its head gets flat on that side and bulges on the other. The plaintiff didn't mention any injury to the back of his head when I examined him in July. It is natural that I would have gone over his head and the only abnormality that I made note of was the injury over his eye.

At the time I was observing the plaintiff here in the courtroom he was at rest and I didn't notice his tremor particularly, except when Dr. Southworth asked him to protrude his tongue there was

(Testimony of Dr. R. H. Thigpen.)

practically no tremor of the tongue. Tremor of the tongue occurs frequently in a lesion in the base of the brain. It comes from other causes also. Having observed the plaintiff in the courtroom and having heard all of the testimony, in my opinion it is not possible that the plaintiff's present condition is due solely to the injury he received. A man who is older than his years and running down has a good foundation on which to build some traumatic neurosis for a while, that is especially during litigation. The plaintiff has the well-known litigation symptoms, insomnia, headache, maybe esthesia in one part and phypesethia in another part and he may be ever so honest in that for the time being and find these symptoms quickly alleviated by a favorable verdict. Worry and emotion have a profound effect. Talking is bound to exaggerate such a condition. When I examined the plaintiff on July twenty-second he was able to perform work which he had been doing. Having heard the history of the plaintiff's habits and work or occupation, I will say that hard work, exposure, alcohol, overeating, are the prominent causes of premature (29) [61] senility which may in the plaintiff's case have caused premature senility. I should think that a laboring man of the plaintiff's age would find it depressing to his vitality in general to work in a hot climate after working in a cooler climate.

Cross-examination of Dr. R. H. THIGPEN.

I don't know whether people are sent from all over the world to Phoenix for their health, but it

(Testimony of Dr. R. H. Thigpen.)

has quite a reputation. People under certain conditions go to warmer climates after they advance in years. I came to the conclusion on my examination of July twenty-second that Mr. Littlejohn was prematurely senile. This senility may have come from chronic disease. I think that shock and worry and emotion over a great period of time will tend to produce the element of senility, under proper conditions. In the short time I had to examine Mr. Littlejohn, I did not find any chronic kidney trouble, which may have brought on Mr. Littlejohn's premature senile condition. Mild kidney trouble usually has a tendency to senility. I could not make such a test this side of Phoenix. I did not find any condition of chronic lung trouble which may have brought on the premature senility. I stated I thought he was able on July twenty-second to perform the work he had been doing previous to his injury.

Testimony of Dr. H. T. Southworth, for Defendant.

I am a physician practicing in Prescott. I graduated in Chicago in 1901. I spent one year as an interne in the hospital, practiced one year and a half in Chicago and since have practiced in Prescott, with the exception of twenty-two months spent in the United States Army. I have examined many people with head injuries such as fractures and concussions. I had an opportunity to superficially examine Mr. Littlejohn's head in (30) [62] the courtroom this afternoon and found no indica-

(Testimony of Dr. H. T. Southworth.)

tion that there had been a fracture of the skull. The skull was quite smooth in front and the scar was plainly felt, somewhat of a separation of the sub-broad tissues. Nothing but a local result followed that injury, that is, the soreness following the wound and the time it required to heal up. I heard the plaintiff testify as to a bump or depression on the back of his head. In my opinion, it follows the suture line and the articulation of the occipital and parietal bone, which at birth is open or only partially closed.

If the inner cable of the bone showed as much concavity as the outer contour of the skull showed it was not fractured at the time of the accident on June second. At one time I noticed the plaintiff place a toothpick in his mouth very carefully and take hold of his necktie very carefully. Another time I saw him take a drink of water out of a glass, which are indications that there is not a marked tremor. A tremor is possible on occasions that wouldn't be noticeable on others. There is such a thing as intention tremor, a condition that appears when a patient tries to do a thing and attention is called to it, when not thinking they are comparatively or entirely steady, a tremor develops. Tremor increases with age. A person who has attained much age rarely is able to write as steady a hand as a younger person, particularly if he is a laboring man. The attention tremor is more noticeable with the hand and the tongue. Hard work such as the plaintiff has testified that he has done has a ten-

(Testimony of Dr. H. T. Southworth.)

dency to age all the tissues as well as the nerves, muscles and the bones. Such a life has a strong tendency to harden the arteries and cause arteriosclerosis. This has an effect on the nervous system from the spinal cord to the brain. (31) [63]

It does not affect the brain so much as the blood supply to the brain. I noticed in plaintiff a well-defined arcus senilis or the white rainbow of the clear part or cornea of each eye. It is called the arcus senilis or old age arc. When one gets older that begins to show. When it shows markedly in one of fifty-seven years he is somewhat beyond his years. Mr. Littlejohn's voice shows that he has not the tone of a strong robust man. We have what you might call the piping voice of old age. Knowing what I do I would say that certain temporary physical conditions have resulted from Mr. Littlejohn's injury. His present nervous condition is not wholly attributable to the injury. Mr. Littlejohn could not obtain relief by medical treatment as there is no relief for old age. It could be alleviated somewhat.

Cross-examination of Dr. H. T. SOUTHWORTH.

Mr. Littlejohn's voice is the kind we find with premature senility or motor senility. It is not necessarily a sign but it is one of the signs. I would not draw my conclusion from one sign. I have heard a few young men with piping voices but not many. One of the causes of premature senility in the plaintiff has been his hard work. No, hard

(Testimony of Dr. H. T. Southworth.)

work is not an antidote for old age. A man who remains in an office and doesn't exercise at all is not always liable to become prematurely senile; walking in the fresh air and physical culture are not all bosh. I have not testified that a man should sit down and do nothing to preserve himself from senility and I have not given the jury that impression. Yes, I have heard of Weston, who was about seventy years of age, who walked from San Francisco to New York and return, but that would not cause premature senility, the two situations are not comparable. I was speaking of a man who has for years done very hard work as the plaintiff has testified he has done and (32) [64] not of a man who walked leisurely across the country. No, the United States Government did not train soldiers for three or four months with the hardest kind of work. The United States training was done in moderation. Yes, I took Mr. Littlejohn's pulse a few minutes ago. Once it was 128 and once 134. 72 and 80 is probably the normal pulse; and in a man of his age a normal pulse might be 80 to 90, sitting. No, I would not judge from his pulse alone that he was in a bad condition. He might be nervous from the fact that three doctors were examining him. No, it is not a fact that the injury was the cause of his present pulse and his present condition. Such injuries do not bring on such a condition as he is in now. If he was sick and suffering for a long enough time it would bring on such a condition,

(Testimony of John T. Littlejohn.)
but it wouldn't produce that arcus senilis since July to the present time.

REBUTTAL.

Testimony of John T. Littlejohn, for Plaintiff (In Rebuttal).

I did not have this depression in the back of my head before I was injured on June second of this year.

Cross-examination of JOHN T. LITTLEJOHN.

I know I didn't because I reckon I know how my own head is shaped. I first noticed it when the swelling went down. It was right over the depression.

Testimony of Sarah Littlejohn, for Plaintiff (In Rebuttal).

Yes, I have been married to Mr. Littlejohn for thirty years and have had occasion to examine the back of his head as I cut his hair at one time. He did not have a depression in his head before his accident on June second. (33) [65]

Thereupon, after a recess, defendant moved the Court to direct the jury to return a verdict for defendant, and as grounds assigned the following:

Comes now the defendant at the close of the evidence and before argument of counsel and moves the Court to direct the jury to return a verdict in favor of the defendant, and as grounds assigns:

1. There is no evidence to sustain a verdict for the plaintiff.

2. The weight of the evidence preponderates in favor of the defendant and against the contention of the plaintiff.

3. This suit is brought under the Employer's Liability Law of Arizona, Chapter VI Title 14, R. S. A. 1913, and there is no evidence of either the plaintiff or the defendant that the plaintiff was engaged at the time of the happening of the alleged accident and injury upon which the suit is founded in any of the occupations declared and determined to be hazardous within the meaning of said law.

4. There is no evidence in the record proving or tending to prove as required by Sec. 3158, R. S. A. 1913, that the accident and injury alleged arose out of and in the course of the employment of the plaintiff and was due to a condition or conditions of such employment, or that the accident and injury alleged were not caused by the negligence of the plaintiff.

5. The evidence shows that the accident could have been avoided by the exercise of care which a reasonable and ordinarily prudent person would have exercised under the same conditions, and the said accident alleged was due to the negligence of the plaintiff. (34) [66]

6. Plaintiff has not introduced evidence to support, and there is no evidence to support the allegations of the complaint that plaintiff was working in defendant's sample-mill, or in any other building or structure where his occupation was hazardous as defined by the law aforesaid.

7. There is no evidence that the alleged accident

was caused by any condition inherent in a hazardous occupation, but the evidence shows that the accident was due to ordinary and avoidable causes in no way conditions of hazardous occupation of any kind.

In the course of argument on said motion, and as shown by the Reporter's notes upon the point urged by defendant that the plaintiff was not shown to be engaged in any occupation declared hazardous within the meaning of the Employer's Liability Law, Section 3156, Paragraphs 1 to 10, at the time of the accident, the Court stated:

"Well, number eight says, 'All work in and about open pits and open cuts.' Suppose you strike those out entirely, 'in and about mines, ore reduction works and smelters.' Now, it doesn't say he must be handling any dangerous machinery. Any work in and about that smelter is dangerous. The very nature of it makes it so, it doesn't make any difference whether he was a member of the bull gang and was scraping up the ground or sweeping around outside of any dangerous place. If he was sent in, it was his duty to go as sent or directed to go, and if he did go in or about a smelter or in or about a reduction work, why, regardless of whether he was actually all the time engaged in dangerous work, he was engaged in dangerous work when so directed."

The COURT.—"The motion is overruled. You may have the benefit of an exception."

DEFENDANT'S ATTORNEY.—"I suppose that covers all these various grounds?"

The COURT.—"Yes." (35) [67]

Thereupon counsel argued to the jury, and in course of argument of plaintiff's counsel, the following statement by plaintiff and objection by defendant was made:

Mr. O'SULLIVAN.—" * * * Now, we have asked for ten thousand dollars. You, Gentlemen, know that ten thousand dollars today is not worth as much as five thousand dollars was four or five years ago."'

Mr. CORNICK.—"We desire to object to this line of argument by counsel to the effect that ten thousand dollars to-day is not worth over what four or five thousand dollars was a few years ago."

The COURT.—"I sustain the objection in so far as it contains a statement of the fact by counsel, because it is not proper to state the fact, but I will permit counsel to argue and to ask the jury to determine whether the purchasing power of a dollar today is less than formerly. They may bring to bear their own knowledge and experience in order to determine that. In other words, I think it is the proper matter for them to consider in case they come to the conclusion that the plaintiff is entitled to recover in this action."

Mr. CORNICK.—"We desire to except to your Honor's ruling."

THEREUPON the Court instructed the jury as follows:

The COURT.—Gentlemen of the jury, as has been told you by counsel, this is an action brought by the plaintiff against the defendant, United Verde Extension Mining Company, to recover from said de-

fendant damages for alleged or claimed personal injuries which the plaintiff claims he sustained while in the employ of the defendant company. The complaint is rather (36) [68] long and has been read in your presence and hearing, and as it had taken only a day and a half to try this case, I deem it unnecessary that I should again read it. The answer of the defendant has also been read in your presence, in which defendant denies the allegations of the plaintiff's complaint and denies that the plaintiff was injured as alleged, denies all of the allegations of the complaint and says if the plaintiff was injured as he claims or at all, it was by reason of his own negligence.

As I told you—some of you in another case of like character—it is the duty of the Court to instruct you as to the law applicable to the evidence and pleadings, and it is your duty to take the law from the Court. It is your duty, however, to determine what the facts are, as the Court cannot do that for you. You determine the facts, what the facts of the case are, and the Court determines the law. Our functions are entirely separate and independent.

This action is brought under and by virtue of what is known as the Arizona Employer's Liability Law, sometimes referred to as the Employer's Liability Law. Under the provisions of that Act, an employer in certain dangerous occupations, among them working in or about quarries, open pits, open cuts, mines, ore reduction works and smelters, is liable for the personal injuries of an employee by an accident arising out of and in the course of such labor,

service and employment and due to a condition or conditions of such employment or occupation in all cases in which such injuries of such employee shall not have been caused by his own negligence, and in such case the employer is liable even though the employer be wholly free from any fault or negligence. (37) [69]

I charge you, as a matter of law, Gentlemen, that all work in and about mines, ore reduction works and smelters is a hazardous occupation within the meaning of the law. Therefore, if you believe, from a preponderance of the evidence, that the plaintiff, at the time he claims to have been injured was working in and about open pits, open cuts, mines, ore reduction works or smelters, he was at the time engaged in a hazardous occupation and that it comes within the meaning of the Employer's Liability Law.

This being an action based upon the Employer's Liability Law of Arizona, as set forth in Paragraph Six of plaintiff's complaint, it is incumbent upon the plaintiff to allege and prove that he was, at the time of the alleged accident and injuries, engaged in one of the occupations declared and determined to be hazardous within the meaning of said law. The fourth paragraph of plaintiff's complaint alleges that at the time of the alleged accident the plaintiff was in the employ of the defendant and was directed and ordered by said defendant corporation and its foreman in charge of said bull gang, to assist in installing certain equipment in defendant's sample-mill, then and there being a

mill used by the defendant to sample, treat and crush ores, the said sample-mill then and there being a part of said smelter, and ore reduction works and an appurtenance thereto; that plaintiff did thereupon engage in said work as directed, that while plaintiff was assisting in putting in said equipment in said sample-mill, he was then ordered and directed by defendant corporation and its said foreman of said bull gang, to place and install in the frame work of certain rolls or rollers in said sample mill, a large iron bolt or rod, approximately four feet in length, by about two inches in diameter, and weighing approximately one hundred pounds, that plaintiff while then (38) [70] and there in the due course of his said occupation and employment, was then and there ordered and directed by the defendant and its said foreman of said bull gang, to take said iron bolt or rod and go upon a certain platform then and there covering a certain concrete pit about ten feet deep by about the same dimensions in width and length, and then and there situate below said platform and in said sample-mill aforesaid; that plaintiff, as directed, did take said iron bolt or rod in his arm and did proceed to and upon said board platform, for the purpose of placing and installing the same as aforesaid.

I charge you that before plaintiff can recover under the allegations of the complaint, he must prove that he was, at the time of the injury, engaged in one of the occupations declared to be hazardous by the Employer's Liability Law, he must prove at the time of the said happening he

was engaged in one of those things declared and determined by said law to be a hazardous occupation, and I further charge you that if he was, at the time, engaged in work in or about open pits, open cuts, mines—(addressing counsel) I don't believe you claim under "open pits or open cuts" in your complaint and it is merely that you claim that the work was done in connection with ore reduction works and mining, so I will modify it. I was simply reading it because it was all in one paragraph, not that I think the word "quarries" has anything to do with this case (addressing the jury), but that all work in and about mines, ore reduction works and smelters, if he was so engaged in that work, he was engaged in a hazardous occupation within the meaning of the law referred to.

Now, the plaintiff, in order to recover under the Arizona Employer's Liability Law, is required, as has been said by the Supreme Court of Arizona, to allege in his complaint (39) [71] and to sustain by evidence, that he was employed by the defendant in an occupation declared to be hazardous, that while engaged in the performance of his duties required of him, he was injured, that the injury was caused by an accident due to a condition or conditions of such employment and was not caused by his own negligence.

Those are the burdens which the plaintiff must discharge and he cannot recover unless he comes within the provisions of that law.

Now, you will, if you have paid close attention, observe that the law says that the accident must

arise out of and be due to a condition or conditions of the employment. That is puzzling term to lawyers and until recently it has never been defined by any court so far as I know, but recently the Supreme Court of Arizona defined it in these words, speaking of the meaning of the words "condition or conditions," it said: "It is evident that the accident must arise out of and also be inherent in the occupation itself. The condition or conditions that produce the accident must inhere in the occupation. If the occupation is nonhazardous, if the condition or conditions inherent therein are innocuous," that is, harmless, or producing no ill effects, "the occupation and the employee therein are outside of the purpose of the purview of the constitution and of the liability law." Now, to be inherent in, or rather, to "inhere" as used in that statute, is to be inherent, to be a fixed element or attribute of a thing. Inherent, existing in something as a permanent attribute or connected with something as a settled function, and "innocuous" as I told you, means harmless or producing no ill effect. (40) [72]

The first question for you to determine is whether the plaintiff at the time and place mentioned in the complaint, and while in the service and employment of the defendant, and in the course of his work in such employment, received the injuries or any of the injuries, described, set forth in his complaint. If you find from the preponderance of the evidence that the plaintiff in the course of his labor and while in the service or employment of the defend-

ant received the injuries or any of the injuries complained of, then you will determine whether such injury was due to a condition or conditions of his occupation or employment, as those terms have been, or that term has been defined to you, and whether such injuries were caused by the negligence of the plaintiff. If you come to the conclusion from the evidence that the injuries were caused by his own negligence, of course, you need not go any further in the case, you stop right there and render a verdict for the defendant.

Now, by negligence, negligence is this: It is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing that such person under the existing circumstances would not have done. The fault may lie in commission or omission, that is in the doing, or the failure to do, and the duty is dictated and measured by the exigency of the particular occasion. Before you can find that the plaintiff was guilty of negligence so as to defeat a recovery on his part, you must find that the negligence was the proximate and efficient cause of the injury complained of; in other words, that such negligence on his part caused or brought about the injury or injuries of which he complained. Of course, every workman should take reasonable care and precaution for his own safety in working and discharging his duties, and if he fails to do so, he cannot recover, that is, if his negligence was the cause or that which brought about the injury. (41) [73]

Now, before the plaintiff can recover under the terms of this Act, he must show that his injuries, if he was injured, were due to an accident arising out of and in the course of his employment in an occupation as I said before, declared by the Act to be hazardous. The words "arising out of" refer to the origin or cause of the injury, and the words "in the course of" refer to the time, place and circumstances under which the accident causing the injury occurred. Unless you find from the evidence in this case that the accident to the plaintiff causing the injury was one arising out of and in the course of his employment, and at the time of his injury, if he was injured, he was engaged in a hazardous occupation, your verdict must be for the defendant.

Numerous requests have been made, Gentlemen, and in determining, in passing upon them, it may be that some of them may be couched in a little different language from the charge that I give, and so if there appears to be repetition, you will understand why.

Now, I say, if you find from the testimony that the plaintiff at the time and place mentioned in the complaint, while engaged in the performance of his duties, sustained the injury or injuries set up in the complaint, and that such injury or injuries were not caused by or were not the result of his negligence, and were caused by an accident due to such condition or conditions or employment, then you will next consider the nature and extent of his injury or injuries so sustained. In this connection the burden of proof is upon the plaintiff to show by

a preponderance of evidence, not only to prove the material allegations of his complaint, but to show that the injuries, defects and afflictions of which he complains, or some of them of which he complains, are the proximate result of said accident, and of (42) [74] course plaintiff cannot recover for any injuries other than those which he has shown by a preponderance of the evidence to have been sustained at the time and place mentioned in the complaint, or are the result of such injury or injuries so received at said time and place.

You are made the judges as to the extent of the injuries, if any, so sustained. It is not for the Court; it is for you to determine that question of fact, that is, as to whether or not they are temporary or permanent in character, and as to what extent, if any, by reason of such injuries only, plaintiff has suffered mental and physical pain and anguish or both, and also as to what extent, if at all, he has been by reason of such injuries disabled and incapacitated from following his usual or any gainful, profitable occupation, and as to whether or not such incapacitation, if any, is permanent or merely temporary.

If you award damages to the plaintiff in this case, in addition to those factors that I have just mentioned, the injuries and the pain and suffering, if any, you will also or may also make due and adequate allowance for the reasonable value of the time lost by the plaintiff as a result of such injury or injuries from the date they were so sustained to the present time, and in connection with that state-

ment of my own I give you a further instruction; you will not under any consideration find damages for any prospective loss of time on the part of the plaintiff after the date of trial, and you will not include this element of loss of time after the date of trial in any damages whatsoever, if you should find that any damages have been sustained. You may consider all the facts and circumstances and his physical condition in determining whether or not he has been incapacitated by reason of such injury or injuries, and may consider (43) [75] that fact in calculating general damages, if any you decide to give him. The sum of $4.60 daily wage need not be accepted by you as the basis for the measure of special damages if you find any such. That sum is the maximum amount plaintiff can be allowed for the period he claims special damages, but you may find any smaller sum, if you find any special damages. In other words, while the plaintiff introduced evidence to show that he was receiving $4.60 a day and that he claims he has lost that sum per day since the date of his injuries to the date of trial, you are not bound by that specific sum, but you may consider that and determine whether or not you accept that, if you award him damages for such loss of time, or whether you will fix it at some other amount. Now, in the ascertainment of damages we pass now from the question of whether or not he was injured and whether or not the injury or injuries were permanent, and if you find that he was injured, then you must determine, as I said before, the extent of the injuries, and whether they

are temporary or permanent, and after you have determined that question, then—and if you do determine that he is entitled to such damages by reason of such injuries, then you proceed to ascertain and determine the amount of damages that should be awarded to him.

Now, in the ascertainment of damage, the law does not lay down any mathematical or definite rule. It says that you, the jury, must determine that matter and that in so doing that you must use sound judgment and good sense and make such an award as would be just compensation for the injury or injuries so sustained, no more and no less. You are not to give anything to the plaintiff beause of his age or through sympathy, or because you may have sympathy for his wife, or because the defendant is a orporation, but you are to decide this (44) [76] case just as you would if the defendant—I will change that,—just the same as if it were an action between two individuals, and you are not to determine it, fix the damages or give any damages at all by reason of the fact that the defendant is a poor man or the defendant has a family—I mean that the plaintiff is a poor man or that the plaintiff has a family, or the defendant is a corporation, unless you believe he is justly entitled to it, and then give him such as would be just compensation, all of that and no more. In other words, you decide the case impartially regardless of consequences, whether it is pleasing to one side or the other. You are here to see that justice is done between these litigants, and when litigants cannot agree and

go into court, then it is the duty of the court and jury to determine their controversy and to do justice between them as nearly as may be.

Now, the Mortality Tables were introduced in evidence in this case and those tables show that the life expectancy of a man fifty-seven years of age is sixteen and a half years. Now, that doesn't show how long this man—and it is not introduced for the purpose of showing how long this man will live. No man can tell that, but it is received for the purpose of showing his probable duration of life, of the probable duration of life of a man fifty-seven years of age. It cannot be claimed that a man will certainly be able to work all the remaining years of his life and be as vigorous as he is at fifty-seven, but in ascertaining the amount that the plaintiff is entitled to, and in considering his damages, if any, and in considering to what extent his capacity has been diminished by reason of the injuries, you are to take into consideration his age, in the first place, his past life, whether or not he was constantly employed, whether or not he was able to do the work, whether or not it is likely that (45) [77] in the future he would continue to be able to do the work and earn the wages which he claims he has received and earned in past years. You are to determine whether or not it is likely he would be constantly employed, whether he would be sick or out of employment, and consider all those matters in determining what amount of compensation, if any you determine should be allowed to him.

Now, you understand, Gentlemen, I think I stated at the time, and I repeat that if you come to the con-

clusion that these injuries of which the plaintiff complains are merely temporary, not permanent in character, then the Mortality Tables, the expectancy tables, have absolutely no place in this case. They are introduced upon the theory that the evidence in the case has shown that the injuries were permanent. Now, that is not a question for me to determine, the question of whether the injuries are permanent is a question for you to determine. If you determine from all the evidence that the injuries of which the plaintiff complains were permanent, then you may use the mortality tables as a basis of calculation and for whatever they are worth in your judgment, but if you come to the conclusion that the plaintiff is not permanently injured, that his capacity to earn a living has not been permanently impaired by the injury or injuries, then you will not consider the mortality tables or the expectancy tables at all. The Supreme Court has said that they are admissible, but that the rule to be derived from these tables may not be the absolute guide of the conscience and judgment of the jury, but the Court does state that where there is any testimony tending to show permanent injuries, they are admissible. Now, in admitting the tables as I said before, I did not determine that they are permanent. That is for you to determine. If you find that they are permanent, then you consider the tables in connection with all the other facts and circumstances of the case. If (46) [78] you do not believe they are permanent, then you must not consider the tables at all. In the language of that Court, the Supreme Court of the

United States, "But it has never been held that the rules to be derived from such tables or computations, must be the absolute guide of the judgment and conscience of the jury. On the contrary, in the important and much considered case of London against Phillips and Southwestern Railway, the Judges strongly approved the practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted and continued, and all the contingencies to which it was liable, and has strongly deprecated undertaking to bind the jury by precise mathematical rules in deciding a question involving so many contingencies, incapable of exact estimate or proof," etc.

Now, as I told you, the expectancy of life is not the same as the expectancy of the duration of ability to work in the case of physical labor, and if the expectancy of life is considered in any case, then the fact that the expectancy of life is materially greater than the probable duration of the period of ability to work must also be considered, since it is the period of expectancy of ability to work which is to be considered, if and when the future earning capacity has been impaired, and future damages can only be awarded in a case when the evidence shows it to be a reasonable certainty; the Supreme Court uses the word "probability."

You must not consider or regard any incapacity or bad physical condition or ill effects of plaintiff, if any, or any ill effects plaintiff may be suffering

on account of other (47) [79] conditions not the proximate result of this alleged accident. If there are any other conditions, you must consider such effects, if any, as are the direct result of the accident, as alleged in the plaintiff's complaint. In cases where future damages have been proved by the evidence and the jury awards damages therefor, the element of advancing age must be taken into consideration. Where earning capacity depends upon physical strength, necessarily physical strength becomes impaired by advancing age and earning capacity is consequently diminished. When a man remains uninjured and in ordinarily good health, this fact must be taken into consideration in such cases and the jury must not consider that the man's earning power will remain constant, except during the period of his entire expectancy for work. As I stated before, Gentlemen, if you find that the plaintiff is entitled to recover in this action, the amount of recovery, if any, is for you to determine from all the facts in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say, in the exercise of a sound discretion from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor and without passion or prejudice, what amount of money will reasonably compensate him for the damage, if any he has sustained, and in order for you to determine the question of fact, it is not necessary that any witness should have expressed any opinion

as to the amount which he believes the plaintiff should be awarded.

Now, you are made by law the sole judges of the facts and of the credibility of the witnesses. In determining the credibility of the witnesses and the weight you will give to their testimony, you have the right to take into consideration their manner and appearance while giving their testimony, (48) [80] their means of knowledge, any interest or motive which they may have, if shown, and the probability or improbability of the truth of their statements when considered in connection with all the other testimony in the case. You are not to disregard the testimony of the plaintiff because he is the plaintiff and interested in the result of the case, nor are you to disregard the testimony of his witnesses because of relationship or friendship. You are not to disregard the testimony of the witnesses for the defendant because they are in the employ of the defendant or because they may be interested in the result of the case, but you are to consider the testimony of all the witnesses fairly and impartially, taking into consideration any interest or motive they may have in the result of the case, and then determine what weight should be given to their testimony. If you believe that any witness has wilfully sworn falsely, intentionally sworn falsely, to a material fact in the case, then you have a right to entirely disregard the testimony of that witness or those witnesses, except in so far as they may be corroborated by other evidence in the case, or by the facts and circumstances in evidence. In other words, Gentlemen,

it is your duty in arriving at a verdict in this case to be governed by the evidence in the case and the law as I am giving it to you in these instructions, regardless of consequences. You are to look at the evidence in a common sense light and to judge of it by that experience and observation of human affairs of which you are possessed as individual members of society, and endeavor to arrive at the truth as the evidence shows it to be. That is a question which you should endeavor and will endeavor to do, to arrive at the truth of this transaction, and then after having so arrived at the truth, let that be represented by your verdict. (49) [81]

Your verdict must be unanimous whichever way you decide the case, and the practice which prevails in the State Courts of allowing a jury of nine of the jury of twelve to return a verdict in a civil case, does not prevail in the Federal Court. The Supreme Court has held that a jury within the contemplation and meaning of the Constitution of the United States means a jury of twelve and not a jury of nine, so that your verdict must be unanimous.

You must not render what is known as a quotient verdict, that is, you must not add together the amounts or the sums which each of you believe the plaintiff is entitled to and then divide it by twelve or any other number. Such or any similar method of arriving at the plaintiff's compensation would not be awarding a just compensation and fair to either the plaintiff or the defendant. It does not mean that you may not discuss what the plaintiff is entitled to, if anything, and finally come to an agree-

ment as to what that amount shall be and representing the unanimous verdict of the jury, but you should not attempt to do it by any such mathematical calculation as I have referred to.

The COURT.—Are there any exceptions on either side to the general instructions?

Mr. CORNICK.—We have exceptions. I didn't know whether your Honor charged all of our requests?

The COURT.—No, I did not; some I gave and some I did not. I will give you an exception to all refused.

Mr. O'SULLIVAN.—Your Honor, we have no exception at all to the Court's instructions. (50) [82]

Mr. CORNICK.—We desire to except to that portion of your Honor's instructions charging to the effect that all work in and about mines, reduction works, smelters, and so forth, fall within those occupations determined and defined by the statute as being hazardous. Second, we except to so much of your Honor's charge—

The COURT.—I wish the jury to consider that statement in connection with the further statement in the charge that the injury or injuries must have shown by a preponderance of the evidence to have arisen out of and in the course of the plaintiff's service or employment and due to an accident arising out of the service and employment and due to a condition or conditions of the employment and not due to the negligence of the plaintiff. In other words, I would not want that one sentence considered wholly independently of the balance of the charge, but in

connection with the charge which I made when I quoted from the case of C. & A. against Chambers, in which I read the duty of the plaintiff before he could recover under this Employer's Liability Law. In other words, I want them to understand that the plaintiff must show by a preponderance of the evidence not only the things mentioned in that case, but that it must also he shown that at the time he was engaged in the service and employment in and about the said hazardous occupation of mining, ore reduction works and smelters. (51) [83]

Mr. CORNICK.—Well, we understand, your Honor, that that does not cure the exact points that we make.

The COURT.—You may have an exception to it.

Mr. CORNICK.—We desire further to except to that portion of your Honor's charge, charging that the jury shall determine whether temporary or permanent injuries were received by the plaintiff, on the ground that there is no evidence of permanency justifying a submission of that question to the jury.

The COURT.—Very well.

Mr. CORNICK.—Further, we desire to except to that part of your Honor's charge as to the mortality tables, because there is no evidence as to the fact that the plaintiff would fall in his occupation within the occupation upon which the mortality tables are based.

The COURT.—Note the exception.

Mr. CORNICK.—And further to that part of your Honor's charge with regard to the mortality tables, permitting the jury to define the relationship of the plaintiff's expectancy to the expectancy as

shown, expectancy of life, as shown by the mortality tables, because there is no evidence in the record upon which the jury could make such a definition or find such a relationship between the plaintiff's expectancy of life and the expectancy of life as defined by the mortality tables.

The COURT.—Very well. Gentlemen of the Jury, if you find for the plaintiff, the form of your verdict will be, "We, the Jury, duly impaneled and sworn in the above-entitled cause, upon our oath do find for the plaintiff and (52) [84] assess his damage at blank dollars," inserting whatever amount you determine should be awarded to him. If you find for the defendant, the form of your verdict would simply be, "We, the Jury duly impaneled and sworn, upon our oath do find for the defendant," and cause your foreman whom you will select, to sign the verdict which represents your conclusion. (53) [85]

The following instructions, requested by defendant, were refused by the Court, and exception allowed defendant:

REQUEST No. 3.

There is no evidence in this case proving the alleged injury was of a permanent character, and the alleged injury must not be considered permanent by you in the consideration of this case.

REQUEST No. 7.

The defendant is not responsible in damages to plaintiff because the plaintiff could not get or did not get work after he left defendant's employ, or because plaintiff did not get work which he considered

he could do. The fact, if such it is (54) [86] found to be, that the plaintiff could not or did not get work should be disregarded by you in any consideration of damages, if any, on account of loss of time between the date of the injury and the date of trial.

REQUEST No. 10.

I charge you that under the allegations of the 4th paragraph of plaintiff's complaint, the plaintiff could recover, if at all, only upon competent evidence that the work and occupation in which he was engaged at the time of the happening of the accident was in that occupation defined under paragraph 5 of Sec. 3156, R. S. A., 1913, which is as follows:

> "All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge structure or other work in which the same are used." [87]

The evidence hereinbefore set out contains all the testimony given on the trial and constitutes all the evidence upon which the Court's instructions aforesaid were based and affecting the matters to which defendant's exceptions relate.

Thereafter the jury returned a verdict of Eight Thousand ($8,000) Dollars in favor of plaintiff.

Thereupon defendant's counsel made motions to set aside the verdict, in arrest of judgment and for a new trial, filing said motions on December 3, 1920, and giving notice thereof. No hearing was had,

and on April 4, 1921, the Court overruled said motions, to which ruling defendant excepted.

The Court then caused an order to be made and entered on April 11, giving defendant 30 days from April 4, 1921, to prepare and serve its bill of exceptions.

Defendant served its said bill upon counsel for plaintiff on May 4, 1921, and presents this its bill of exceptions and asks that same be examined, approved and allowed by the Court and filed made and deemed to be a part of the record in this cause.

The defendant prays that this bill of exceptions may be settled, allowed and signed.

FAVOUR & CORNICK,
Attorneys for Defendant.

Approved, settled and allowed May 24, 1921.

WM. H. SAWTELLE,
Judge. [88]

[Endorsements]: In the District Court of the United States, in and for the District of Arizona. John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Bill of Exceptions. Filed May 5, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

Copy received this 4th day of May, 1921.

O'SULLIVAN and MORGAN,
Attorneys for Plaintiff. [89]

In the District Court of the United States, in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Petition for Writ of Error and Order Allowing Same.

And now comes the United Verde Extension Mining Company, defendant in the above-entitled action, and says: That on November twenty-seventh, 1920, a jury duly impaneled in the above cause returned a verdict for the plaintiff for the sum of Eight Thousand Dollars ($8,000.00), and judgment was entered accordingly in favor of the plaintiff; that in the proceedings, instructions and judgment had in this cause, certain errors were committed to the prejudice of the defendant, all of which will in more detail appear from the assignment of errors, which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for correction of errors so complained of, and that a transcription of the records of the proceedings and the papers in this case duly authenticated may

be transmitted to the said Circuit Court of Appeals.

FAVOUR & CORNICK,
Attorneys for Defendant. [90]

ORDER.

Writ of error allowed on the assignment of errors filed with this petition, upon giving bond by the defendant as required by law for the sum of Eight Thousand Five Hundred Dollars ($8,500.00).

WM. H. SAWTELLE,
Judge.

Made this 24th day of May, 1921. (2) [91]

In the District Court of the United States, in and for the District of Arizona.

No. L–85.

JOHN T. LITTLEJOHN,
Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now defendant, United Verde Extension Mining Company, files herewith its following assignment of errors in connection with and as a part of its petition for a writ of error filed herein, which it avers were committed by the Court in the proceedings in this case, before and after the rendition of the judgment in the records herein, and

upon which assignment of errors defendant relies in the prosecution of the writ of error from the judgment, orders and rulings of the Court.

The Court erred to the prejudice of the defendant (exception having been taken to said orders and rulings):

I.

In overruling and denying defendant's motion that plaintiff be required to strike from his complaint the last sentence in paragraph V, "That he has sustained special damages for loss of time by reason of said injuries in the sum of Four and 60/100 Dollars ($4.60) per day from June 2, 1920, until the trial of this cause, less said period of seventeen days aforesaid"; for the reason that the said allegation is speculative as to the time after date of instituting and no recovery for such special [92] damage is authorized or contemplated under the Employer's Liability Law.

II.

In overruling defendant's motion to strike paragraph 2 of the prayer of plaintiff's complaint on page 6, praying judgment "for the sum of $4.60 per day from June 2, 1920, until the trial of this cause (less a period of seventeen days) for special damages for loss of time occasioned by reason of said personal injuries sustained"; for the reason that the sum prayed for is speculative and uncertain.

III.

In overruling defendant's first demurrer to plaintiff's complaint, for the reason that no facts are stated to show that plaintiff was engaged in a hazardous occupation at the time of the accident.

IV.

In overruling defendant's second demurrer to plaintiff's complaints, for the reason that there are no facts stated showing loss of time due to the accident, or showing any special damages or right of recovery for such special damages under the Employer's Liability Law.

V.

In overruling the objection of the defendant and the motion of the defendant to strike out the testimony of the plaintiff relating to what was alleged to have been told him concerning liability insurance supposed to have been carried by the defendant, for the reason that said testimony had been given in response to permission given by the Court to the plaintiff to testify and such testimony concerning insurance is prejudicial to an employer. (2) [93]

VI.

In sustaining the objection of the plaintiff to which exception was made, to the request and demand by the defendant that the Court order a physical examination of the plaintiff by two disinterested physicians to be appointed by the Court, the plaintiff having introduced his head and physical condition in evidence; for the reason that the submission of plaintiff's head to examination by the jury made it an exhibit subject to a complete examination to elucidate the matter in dispute.

VII.

In overruling defendant's motion that a mistrial be declared because of the testimony given by the plaintiff on cross-examination, not in response to a

question by the defendant but after a suggestion of the Court, concerning the alleged carrying of liability insurance by the defendant; for the reason that the said testimony was prejudicial to the defendant and could not be corrected by striking.

VIII.

In overruling defendant's objection, to which exception was taken, to the testimony of the plaintiff's witness Harry Garrison, that during three years prior to the accident, "he (plaintiff) was apparently healthy and sound"; for the reason that the witness was not qualified to express such an opinion and the said testimony was solely a matter of opinion and not of fact.

IX.

In overruling the defendant's objection, to which exception was taken, to testimony on direct examination of plaintiff's wife respecting alleged signs of pain exhibited by plaintiff, as follows: (3) [94]

"Q. Did he manifest any signs of pain?" (Objection by defendant to the line of testimony; objection overruled; exception taken.)

"Q. Please tell the jury what you noticed by way of your husband's manifestation of pain after his injury."

"A. Well, he was restless of a night and when he was sleeping he moaned in his sleep."

X.

In overruling objection, to which exception was taken, to the admission in evidence of mortality tables, for the reason that there was no legal evidence and substantial evidence to a reasonable cer-

tainty of permanency of any alleged injury.

XI.

In denying defendant's motion for a directed verdict for the defendant at the close of the evidence, to which ruling exception was taken, for the reasons stated in said motion that there was no evidence that plaintiff was in a hazardous occupation at the time of the accident, and that there was no substantial evidence to sustain a verdict for plaintiff.

XII.

In overruling defendant's objection, to which ruling exception was taken, to the argument of counsel for plaintiff to the jury, "Now, we have asked for ten thousand dollars. You gentlemen know that ten thousand dollars to-day is not worth as much as five thousand dollars a few years ago," and in permitting the said counsel to argue and to ask the jury to determine whether the purchasing power of a dollar to-day is less than formerly; for the reason that said argument was immaterial to the issue raised upon facts not in evidence and prejudicial to the defendant. (4) [95]

XIII.

In instructing the jury over objection and exception of the defendant as follows:

> "I charge you, as a matter of law, Gentlemen, that all work in and about mines, ore reduction works and smelters is a hazardous occupation within the meaning of the law. Therefore, if you believe from a preponderance of the evidence, that the plaintiff, at the time he claims to have been injured was work-

ing in and about open pits, open cuts, mines, ore reduction works, or smelters, he was at the time engaged in a hazardous occupation and that it comes within the meaning of the Employer's Liability Law."

XIV.

In instructing the jury over objection and exception of the defendant as follows:

"And I further charge you that if he was, at the time, engaged in work in or about open pits, open cuts, mines,—(addressing counsel) I don't believe you claim under 'open pits or open cuts' in your complaint and it is merely that you claim that the work was done in connection with ore reduction works and mining, so I will modify it. I was simply reading it because it was all in one paragraph, not that I think the word 'quarries' has anything to do with this case, (addressing the jury) but that all work in and about mines, ore reduction works and smelters, if he was so engaged in that work, he was engaged in a hazardous occupation within the meaning of the law referred to."

XV.

In instructing the jury over objection and exception of the defendant as follows:

"You are made the judges as to the extent of the injuries, if any, so sustained. It is not for the Court; it is for you to determine that question of fact, that is, as to whether or not they are temporary or permanent in character, and as to

what extent, if any, by reason of such injuries only, plaintiff has suffered mental and physical pain and anguish or both, and also as to what extent, if at all, he has been by reason of such injuries disabled and incapacitated from following his usual or any gainful, profitable occupation, and as to whether or not such incapacitation, if any, is permanent or merely temporary."

"Now, in the ascertainment of damages we pass now from the question of whether or not he was injured and whether or not the injury or injuries were permanent, and if you find that he was injured, then you must determine, as I said before, the extent of the injuries, and whether they are temporary or permanent, and after you have determined that question, then—and if you do determine that he is entitled to such damages by reason of such injuries, then you proceed to ascertain and determine the amount of damages that should be awarded to him." (5) [96]

XVI.

In refusing to instruct the jury as requested by defendant in its Instruction No. 3, to which ruling defendant excepted as follows:

"There is no evidence in this case proving the alleged injury was of a permanent character, and the alleged injury must not be considered permanent by you in the consideration of this case."

XVII.

In refusing to instruct the jury as requested by

defendant in its Instruction No. 7, to which ruling defendant excepted as follows:

> "The defendant is not responsible in damages to plaintiff because the plaintiff could not get or did not get work after he left defendant's employ, or because plaintiff did not get work which he considered he could do. The fact, if such it is found by you to be, that the plaintiff could not or did not, get work should be disregarded by you in any consideration of damages, if any, on account of loss of time between the date of the injury and the date of trial."

XVIII.

In refusing to instruct the jury as requested by defendant in its Instruction No. 10, to which ruling defendant excepted, as follows:

> "I charge you that under the allegations of the 4th paragraph of plaintiff's complaint the plaintiff could recover, if at all, only upon competent evidence that the work and occupation in which he was engaged at the time of the happening of the accident was in that occupation defined under paragraph 5 of Sec. 3156, R. S. A. 1913, which is as follows:
>
> " 'All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.' "

XIX.

In refusing to instruct the jury as requested by

defendant in its Instruction No. 6, to which ruling defendant excepted as follows:

"This being an action based upon the Employer's Liability Law of Arizona, as set out in paragraph 6 of plaintiff's complaint, it is incumbent upon the plaintiff to allege and prove that he was at the time of the alleged accident and injury engaged in one of the occupations declared and determined to be hazardous within the meaning of said law. (6) [97]

"The 4th paragraph of plaintiff's complaint alleges that at the time of the alleged accident the plaintiff was in employ of defendant and was directed and ordered by said defendant corporation and its foreman in charge of said bull gang to assist in installing certain equipments, in defendant's sample-mill then and there being a mill used by defendant to sample, treat and crush ores, and said sample-mill then and there being a part of said smelter and ore reduction works, and an appurtenance thereto; that plaintiff did thereupon engage in said work as directed; that while plaintiff was assisting in putting in said equipment in said sample-mill, he was then and there ordered and directed by defendant corporation and its said foreman of said bull gang to place and install in the frame work of certain rolls or rollers in said sample-mill a large iron bolt or rod approximately four feet in length by about two inches in diameter, and weighing approximately one hundred pounds; that plaintiff, while then and there in the due

course of his said occupation and employment, was then and there ordered and directed by defendant and its said foreman of said bull gang to take said iron bolt or rod and go upon a certain board platform then and there covering a certain concrete pit about ten feet deep by about the same dimensions in width and length; and then and there situate below said platform and in said sample-mill aforesaid; that plaintiff, as directed, did take said iron bolt or rod in his arms and did proceed to and upon said board platform for the purpose of placing and installing the same as aforesaid.

"I charge you that before plaintiff can recover under the allegations of his complaint he must by competent evidence prove that he was at the time of the happening of the alleged accident and injury engaged in one of the occupations declared and determined to be hazardous by the Employer's Liability Law; he must prove that at the time of the said happening he was then engaged in doing one of those things declared and determined by the said law to be a hazardous occupation."

XX.

In denying the motion of defendant that the verdict and judgment be set aside as indefinite and uncertain and not responsive to the issues, which ruling was excepted to by defendant; for the reason that the complaint and prayer state two issues, one for special and one for general damages, and the ver-

dict was for one sum without stating on which of the issues it was given.

FAVOUR & CORNICK,
Attorneys for Defendant. [98]

[Endorsements]: In the District Court of the United States, in and for the District of Arizona. John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Petition for Writ of Error and Assignment of Errors. Filed May 19, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

Copy received May 18, 1921.

O'SULLIVAN & MORGAN,
Attorneys for Plaintiff. [99]

At a regular term, to wit, the May Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said court in the city of Tucson, State and District of Arizona, on Tuesday, May 24, 1921—Honorable WILLIAM H. SAWTELLE, District Judge, presiding.

(Minute Entry—May 24, 1921.)

L–85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—May 24, 1921—Order Granting Petition for Writ of Error.

IT IS ORDERED that the petition of the defendant herein for writ of error be, and it is granted; and

IT IS FURTHER ORDERED that the said writ be allowed upon giving bond by defendant, as required by law, for the sum of $8500.00. [100]

In the District Court of the United States in and for the District of Arizona.

No. L–85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Stipulation Fixing Time to File Supersedeas Bond.

IT IS HEREBY STIPULATED and agreed by and between the plaintiff and the defendant that defendant shall have to and including June 1, 1921, in which to file his supersedeas bond in the sum of $8500, as ordered by the Court

O'SULLIVAN & MORGAN,
Attorneys for Plaintiff.
FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsement]: Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [101]

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, United Verde Extension Mining Company, a corporation, as principal, and George Kingdon and David Morgan, as sureties, are held and firmly bound unto John T. Littlejohn, defendant in error, in the full sum of Eight Thousand Five Hundred Dollars ($8,500.00), the same being the amount of the bond fixed by the District Court of the United States, for the District of Arizona, by order duly entered on the records of said Court on the nineteenth day of April, 1921, to be paid to the said defendant in error, his legal representative, executor, administrator or successor, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of May, 1921.

WHEREAS, on the twenty-seventh day of November, 1920, at the District Court of the United States, for the District of Arizona, in a suit pending in said court, between John T. Littlejohn, plaintiff, and United Verde Extension Mining Company, defendant, a judgment was rendered in favor of plaintiff and against the said defendant for the sum of Eight

Thousand Dollars ($8,000.00), with interest thereon until paid at the rate of six per cent per annum together with the sum of One Hundred Nine and 40/100 Dollars, costs of action, and the said defendant has obtained a writ of error to reverse said judgment in the aforesaid action, and filed a copy thereof in the clerk's office of said court, and a citation directed to the said John T. Littlejohn plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, State of California. [102]

NOW, THEREFORE, the condition of the obligation is such that if the said United Verde Extension Mining Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

UNITED VERDE EXTENSION MINING COMPANY.

By L. E. WHICHER,
Vice-Prest.,
Principal.

[Seal] C. P. LUND,
Secty.

GEO. KINGDON.
DAVID MORGAN.

State of Arizona,
County of Yavapai,—ss.

On the 25th day of May, 1921, personally appeared before me George Kingdon and David Morgan, re-

spectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein stated.

And the said George Kingdon and David Morgan, being by me duly sworn, each for himself and not one for the other, says, that he is a resident and householder of the said County of Yavapai, and that he is worth the sum of Eight Thousand Five Hundred Dollars ($8,500.00) over and above his just debts and legal liabilities and property exempt from execution.

[Seal] GEO. KINGDON.
DAVID MORGAN.

Subscribed and sworn to before me this 25th day of May, A. D. 1921.

My commission expires January 7, 1922.

DAISY D. JONES,
Notary Public.

The within bond is approved both as to sufficiency and form this 28th day of May, 1921.

WM. H. SAWTELLE,
Judge. (2)

[Endorsements]: Supersdeas Bond. Copy delivered May 26,1921, to office of O'Sullivan & Morgan.

FAVOUR & CORNICK,
Attys. for Defendant.

Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [103]

In the District Court of the United States, in and for the District of Arizona.

L–85. (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Writ of Error (Copy).

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between John T. Littlejohn, plaintiff, and the United Verde Extension Mining Company, a corporation, defendant, a manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you

have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [104] to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court of the United States, this 27th day of May, 1921, and of the Independence of the United States the one hundred and forty-fifth.

C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk.

[Endorsements]: Writ of Error. Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [105]

In the District Court of the United States in and for the District of Arizona.

L–85 (PRESCOTT).

JOHN T. LITTLEJOHN,
Plaintiff,
vs.
UNITED VERDE EXTENSION MINING COMPANY, a Corporation,
Defendant.

Citation on Writ of Error (Copy).

The President of the United States to John T. Littlejohn and O'Sullivan and Morgan, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Extension Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court, this 28th day of May, 1921, and of the Independence of the United States the one hundred and forty-fifth.

WM. H. SAWTELLE,
United States District Judge for the District of Arizona.

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoenix, Arizona, Tuesday, May 31, 1921, and executed the same June 4, 1921, at Prescott, Arizona, by delivering a true copy

hereof to Jos. H. Morgan, a member of the firm of O'Sullivan & Morgan personally.

J. P. DILLON,
United States Marshal.
By Minnie Seaman,
Deputy. [106]

[Endorsements]: In the District Court of the United States in and for the District of Arizona. L–85—Prescott. John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Citation on Writ of Error. Filed June 7, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [107]

In the District Court of the United States in and for the District of Arizona.

L–85 (PRESCOTT).

JOHN T. LITTLEJOHN,
Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation.

Praecipe for Transcript of Record.

To the clerk of the United States District Court for the District of Arizona:

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under

the writ of error to be perfected to said court in said cause and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll.
Order overruling defendant's motion to strike.
Order overruling defendant's demurrer.
Transcript of all minute entries and orders.
Motion in arrest of judgment and to set aside verdict.
Motion for new trial.
Order extending time to serve bill of exceptions.
Bill of exceptions and approval.
Petition for writ of error, and order allowing writ.
Assignment of errors.
Order fixing amount of bond.
Stipulation for extension of time to file bond.
Bond.
Writ of error.
Citation.
Praecipe for transcript.

—and all other records, entries, pleadings, proceedings, papers and files necessary and proper to make a complete record upon said writ of error in said cause.

Said transcript to be prepared as required by the law and the rules of this Court and the rules of the said United States Circuit Court of Appeals for the Ninth Circuit.

FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsements]: Copy received this 27th day of May, 1921.

O'SULLIVAN & MORGAN,
Attorneys for Plaintiff.

[Endorsements]: Praecipe for Transcript of Record. Filed May 31, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [108]

In the District Court of the United States in and for the District of Arizona.

No. L–85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Certificate of Clerk United States District Court, District of Arizona, to Transcript of Record.

United States of America,
District of Arizona,—ss.

I. C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of John T. Littlejohn, Plaintiff, vs. the United Verde Extension Mining Company, a Corporation, Defendant, said case

being No. 85 (Prescott), on the Law Docket of said Court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk, in the city of Phoenix, State and District, aforesaid.

I further certify that the original writ of error and citation on writ of error are incorporated in said transcript of record.

I further certify that the cost of preparing and certifying to said record amounts to the sum of Thirty-two & 90/100 ($32.90) Dollars [109] and that same has been paid in full by the plaintiff in error, United Verde Extension Mining Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Phoenix, in said District, this 16th day of June, 1921, and of the Independence of the United States of America the one hundred and forty-fifth.

[Seal] C. R. McFALL,
Clerk United States District Court, District of Arizona.

By Clyde C. Downing,
Chief Deputy Clerk. [110]

In the District Court of the United States in and for the District of Arizona.

L–85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Citation on Writ of Error (Original).

The President of the United States to John T. Littlejohn and O'Sullivan & Morgan, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona wherein the United Verde Extension Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court, this 28th day of May, 1921, and of the Independence of the

United States the one hundred and forty-fifth.

WM. H. SAWTELLE,

United States District Judge for the District of Arizona. [111]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoenix, Arizona, Tuesday, May 31, 1921, and executed the same June 4, 1921, at Prescott, Arizona, by delivering a true copy hereof to Jos. H. Morgan, a member of the firm of O'Sullivan & Morgan, personally.

J. P. DILLON,
United States Marshal.
By Minnie Seaman,
Deputy.

[Endorsed]: Mar. Docket No. 1119, page 27. In the District Court of the United States in and for the District of Arizona. L–85 (Prescott). John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a corporation, Defendant. Citation on Writ of Error. Filed June 7, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [112]

In the District Court of the United States in and for the District of Arizona.

L–85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Writ of Error (Original).

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between John T. Littlejohn, plaintiff, and the United Verde Extension Mining Company, a corporation, defendant, a manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you

have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [113] to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court of the United States, this 27th day of May, 1921, and of the Independence of the United States the one hundred and forty-fifth.

[Seal] C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk. [114]

[Endorsed]: No. ——. In the District Court of the United States for the District of Arizona. L–85 (Prescott). John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Writ of Error. Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [115]

[Endorsed]: No. 3703. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Extension Mining Company, a Corporation, Plaintiff in Error, vs. John T. Littlejohn, Defendant

in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed June 20, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.